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No.

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

LILLIAN BROWN JOHNSON

Petitioner

vs.

THE STATE BAR OF CALIFORNIA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

LILLIAN BROWN JOHNSON
P. O. Box 19-1191
Los Angeles, California 90019

1-310-826-2180

Petitioner Attorney *Pro Se*

48pp

QUESTIONS PRESENTED

1. Is a State Supreme Court which appoints employees to a private party, and by finding against the other party obtains monies for their appointees' employer to reimburse their appointees' salaries and benefits and to fund other programs administered by their appointees, disqualified to sit on cases involving that party?

2. Is the administrative decision-making by one who obtains monies to recoup his salary and benefits and those of his co-employee prosecutors and investigators for his private employer and other funds for his employer's private projects from each accused he finds guilty unconstitutional for lack of a fair and impartial adjudicator, especially when the judge is selected, hired, and employed by the prosecuting party?

3. Is the prosecution by an employee of a privately financed party who desires to recoup his and his co-employee judges, prosecutors, investigators, and staff's salaries and benefits and obtain funds for his

employer's non-disciplinary projects from an accused a bad faith prosecution which denies due process of law?

4. Is the State Bar Court of the State Bar of California unconstitutional as a denial to registered voters of the equal protection of State Law which provides courts are created by the registered voters by constitutional amendment, the Governor fills interim vacancies in judgeships to Courts, state court judges are elected by the registered voters, and the State Bar is ordered to be a public corporation?

5. Is the publication State-wide in the press of inflammatory, prejudicial comments and a suspension recommendation of three employees of a State Bar, including a non-lawyer, prior to access to the judicial adjudication a denial of due process as prejudicing judicial proceedings?

6. Is a state statute making an act of moral turpitude a sanctionable offense unconstitutional for overbreadth?

7. Is a state statute making an act of moral turpitude a sanctionable offense unconstitutional for vagueness as

applied to a claim a written loan between an attorney and her sister-in-law of thirty eight years for $19,860 with ten percent interest, interest only payments for five years, and principal due in the fifth year is an act of moral turpitude?

8. Is a rule of professional conduct concerning business transactions between attorney and client which provides a client must be "given a reasonable opportunity to seek the advice of independent counsel of the client's choice on the transaction" unconstitutional for overbreadth and vagueness as applied to a decision's claim this rule means that the attorney "was obligated to go beyond informing Ms. Brown that she had a right to consult another attorney and was required to advise her to do so?"

9. Is a rule of professional conduct concerning business transactions between attorney and client which provides the terms must be transmitted in writing to the client in "manner and terms which should have been reasonably understood by the client" unconstitutional for overbreadth and vagueness as applied to a decision's claim this means

an attorney is "obligated to insure that the terms and conditions of the loan were fully known and understood" by the client?

10. Is a rule of professional conduct concerning business transactions between attorney and client which provides it must be "fair and reasonable to the client" unconstitutional for vagueness and overbreadth as applied to a claim that a $19,860.00 loan between an attorney and her sister-in-law of thirty eight years which is set forth in a promissory note and loan document with ten percent interest, interest payments for five years, and principal due in the fifth year is not fair and reasonable to the client when the client objected and willingly agreed to it?

11. Is a rule of professional conduct sanctioning an attorney for failure to deliver funds to a client when the only evidence presented indicates the attorney paid the client directly unconstitutional for vagueness?

12. Is a rule of professional conduct sanctioning an attorney

for not depositing funds in a trust account, when the funds had become personal by reason of a prior loan to the attorney from her sister-in-law from said funds, unconstitutional for overbreadth, vagueness, and financial interest in the administrative adjudicators and their co-employee prosecutors when their mutual employer confiscates the interest each month for itself from all trust funds ?

13. Is a two year and indefinite suspension based on charges never filed or heard a denial of due process of law?

LIST OF PARTIES

The parties are as follows:

LILLIAN BROWN JOHNSON
P. O. Box 19-1191
Los Angeles, Ca. 90019

1-310-826-2180

Petitioner Attorney *Pro Se*

THE STATE BAR OF CALIFORNIA
555 Franklin Street
San Francisco, Ca. 94102-4498

1-415-561-8200

Respondent

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner Attorney respectfully prays that a writ of certiorari issue to review the judgment of the California Supreme Court, docket no. S046247, entered on August 10, 1995. Appendix A.

Said Judgment denies a Petition for Disqualification of the California Supreme Court and a Petition for a Writ of Review of a recommendation of suspension of the attorney's license to practice law for two years and indefinitely made by the California

Supreme Court's appointees to the prosecuting party, the State Bar of California. Said judgment suspends the attorney's license until she demonstrates rehabilitation and fitness to practice law as determined by the prosecuting party with a five year stayed suspension and probation, as recommended by the California Supreme Court's appointees to the State Bar of California. Appendix A.

"App" hereinafter refers to exhibits contained in the Appendix.

The Petition for Disqualification was filed to request the California Supreme Court assign a State Court of Appeals, as permitted constitutionally, to hear and determine the Petition requesting review of a recommended decision of its appointees to the State Bar of California. App. D. The Petition for a Writ of Review of the recommended decision questions whether the California Supreme Court may create a private court with a private party to license the state's attorneys and award monies for its appointees' employer by denying review of takings of licenses by its appointees to a State Bar, whether the partisan role and the

financial interest of adjudicators and prosecutors employed by that private party deny an attorney due process of law, whether publication of a recommendation of State Bar employees as a court decision in the state-wide press by the State Bar inflamed and prejudiced the judicial proceedings and denied due process to the attorney, whether the business transaction, moral turpitude, and trust account rules sweep unnecessarily into a substantial amount of protected first amendment activity, and are a denial of due process for vagueness as applied, and whether a license taking of in excess of two years and indefinitely may occur without any evidence and based on charges never filed or heard. App. D.

I.

ORDERS BELOW

The summary order of the California Supreme Court denying the Petition for Disqualification and Petition for a Writ of Review and entering an order of suspension of the Petitioner for two years and until rehabilitation by the State Bar with a five year stayed suspension and probation is reproduced at the

appendix at A.

II.

JURISDICTION

The jurisdiction of this Court is involved under 27 U.S.C.A. s. 1257(3). This Petition for writ of certiorari is timely filed within ninety days of the order of the Supreme Court of California on August 10, 1995. Appendix A.

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment XIV: "No State shall .... deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

California Constitution

Article 6, section 1: "The judicial power of the State is vested in the California Supreme Court, the Courts of Appeal, the Superior Courts, and the Municipal Courts. All courts are courts of record."

Article 6, section 9: "The State Bar of California is a public

corporation...."

Article 6, section 12: (a) "The California Supreme Court may... transfer a cause from itself to a court of appeal...The court to which the cause is transferred has jurisdiction."

Article 6, section 14: "The legislature shall provide for the prompt publication of such opinions of the Supreme Court and Courts of Appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person. Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated."

Article 6, section 16: "(a) Judges of the Supreme Court shall be elected at large and judges of courts of appeal shall be elected in their districts at general elections at the same time and places as the Governor.....(b) Judges of other courts shall be elected in their counties or districts at general elections."

The state statutes at issue are California Business and Professions Code sections 6079.1, 6079.5, 6086.5, 6086.10, 6086.65(a), 6106, 6140.5, and 6211. The former California Rules of Professional Conduct Rules at issue are 5-101 and 8-

101(A)(2) and (B)(4). They are set forth at Appendix B.

IV.

STATEMENT OF THE CASE

The California Supreme Court created with the State Bar of California, pursuant to statute, a private, partisan, financially interested State Bar Court to license the state's attorneys. The State Constitution bars court creation by government. It reserves court creation exclusively to the registered voters. The Petitioner is a registered voter and an attorney at law for over twenty years. She is a black woman attorney for over twenty years. She is a registered voter. She has no prior record of any discipline.

Compelled attorney members of the State Bar are excluded from participation in the private court. They are reduced to being the class of the accuseds. The prosecutors, investigators, and judges are employees of the State Bar. They award their mutual private employer monies for their salaries and benefits and funds for other programs of their employer, such as its Client Security Fund, by finding each accused attorney guilty of professional misconduct, taking or impairing each license to

practice law, imposing the funds they want for themselves, proceeding without evidence or notice, denying all issues of all accuseds, changing the statutes or rules on an *ad hoc* basis and on whim, and publishing in the State-wide press their recommendations as official Court decisions with those of the United States Supreme Court, Ninth Circuit Court of Appeals, and State Courts when the State Constitution has ordered that no decisions except those of the State Supreme Court and State Court of Appeals may be published in the State.

Approximately 4,125 attorneys' licenses have been taken in less than five years at a net financial benefit to the State Bar of in excess of fifteen million dollars from the takings. Older attorneys are forced out or disbarred. This opens up new slots for more attorney admittees who will pay many thousands of dollars for admission and pay whatever the State Bar wants for many years. The churning of attorney admissions and discipline is a profitable private business. Refer footnote 1.

Petitioner had a loan transaction with her sister-in-law. She enjoyed a close relationship with her sister-in-law for over

thirty eight years. App. C:29. The loan was from the proceeds of an insurance settlement Petitioner obtained for her sister-in-law. The loan was for $19,860.00. It was evidenced by a written promissory note and loan agreement. It provided for ten per cent interest. Payments were interest only for five years. Full payment of principal was to be made in five years. There was no dispute the sister-in-law signed the loan documents giving the loan to the Petitioner prior to the settlement being received and that the loan documents were authentic. The sister-in-law never objected to the loan or any of its terms. She subsequently died and was unavailable to testify. App. E:2, ft.1, E:6-E-7.

"Section[s]" refers to sections of the California Business and Professions Code. "Rule[s]" refers to the California Rules of Professional Conduct.

Three State Bar of California's employees, two attorneys and a lay person, in its "State Bar Court" recommended a two year open-ended suspension of the Petitioner's license to practice law and until rehabilitation with a five year stayed suspension [1] on

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1 The State Bar of California hires, pays, and employs the

a claim that the attorney's a) "procurement of the loan and retention of the balance of the settlement funds constituted acts of moral turpitude and dishonesty." App. E:20, b) the loan was an improper business transaction, App. E:16-19, and c) the deposit, after payment of the sister-in-law's share of the insurance settlement and the making of the loan, into a personal account was a prohibited deposit. App.E:25.

There was no evidence presented in support of these findings.[2] The Notice of the proceedings did not contain any of these charges, claims, or allegations. App. F. These new charges were made up without notice after the fact and first appeared in

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prosecutors, investigators, and the judges in its State Bar Court system as its employees. Refer California Business and Professions Code sections 6094.1, 6079.1, 6079.5, 6086.5, 6086.65. It awards itself money for its salaries and benefits and to funds its other programs by finding guilt of each accused. Sections 6086.10, 6086.13. On information and belief, the assessment on the Petitioner will be approximately $10,000 for a trial.

2

The findings were based on the hearsay of the daughter of the deceased sister-in-law. She was asked whether her mother had told her about the receipt of monies from the Respondent, to which she responded,"No." The State Bar has exempted itself from the state law requirements applying the rules of evidence in its proceedings. Section 6002.

the State Bar's press publication of its recommendation as a State Bar Court decision throughout the entire state. App. E.

The State Bar employees, who call themselves "Judges to a State Bar Court," are paid out of the private revenues of the State Bar, including the sums they assess upon finding each accused guilty. Refer footnote 1. They published state-wide in the press their claimed "decision" as a claimed "State Bar Court" finding the Petitioner culpable. App. E. The State Bar is prohibited by the California Constitution and the Rules of Court from publishing any decisions and may only make recommendations without publication. [3] They cited themselves

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3 The State Bar has had an exclusive contract with the Los Angeles Daily Journal Corporation which owns all but two legal newspapers in the State. Article 6, section 14 of the California Constitution prohibits the publication of any legal decisions except those of the State Court of Appeals and State Supreme Court. The State Bar got the Los Angeles Daily Journal Corporation to publish its recommendations as court decisions in its Appellate Reports with those published of the United States Supreme Court, the Ninth Circuit Court of Appeals, the State Supreme Court, and the State Court of Appeals. App. E. As such, while the State Bar's role is advisory constitutionally, it publishes its recommendations as final court decisions as if it were a Court of law and labels them Court decisions. The California Constitution ordered the State Bar to be a public corporation, but it has held itself out to fifty million state citizens

as the law, when they are prohibited from issuing decisions or citing themselves. [4]

Following the publication, Petitioner filed her Petition for Disqualification and Petition for Review with the California Supreme Court requesting a hearing on the recommendation and her constitutional issues. App. C and D. As with all cases since it appointed employees to the State Bar to license the State's attorneys in 1989, the California Supreme Court summarily denied the Petitions. No reasons were stated. It awarded monies payable to its appointees' employer. App. A-1-2. That sum will be in excess of $10,000 for a brief trial. This is in addition to the $20,000 ordered paid to the State Bar's Client

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with its published decisions as a Court of law for over four years when it is constitutionally prohibited from issuing decisions or being a Court. Article 6, sections 1, 9 and 14, Ca. Constitution, App. B.

[4]

California Rules of Court, Rules 977 states, [Unpublished opinions] An opinion that is not ordered published [by the California Supreme Court] shall not be cited or relied on by a court or a party in any other action or proceeding... (with exceptions not applicable)."

Security Fund if the loan is not paid to the Estate of the deceased sister-in-law. App. A-1.

V.

REASONS FOR GRANTING THE WRIT

A. The Partisan Role of the California Supreme Court for the Prosecuting Party by it Appointing Employees to it and Awarding Money to their Appointees' Employer by Denying Hearing to Each Accused Poses Due Process Problems

Based on this Court's statement that the test is whether the situation offers a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the State and the accused, **Aetna Life Insurance Company v. La Voie** 475 U.S. 813, 89 L. Ed. 823, 106 S. Ct. 1580 (1988), is not a situation where a State Supreme Court appoints employees to a prosecuting party to be its "judges," whose recommendations it then reviews, when the party employing its appointees is privately financed, and where by denying all petitions of all accuseds, it orders monies paid as "costs" to reimburse the party for the salaries and benefits of not

only its appointees to a party, but for their co-employees as well, and orders monies for its appointees' employer's private fund of in excess of $20,000 for its appointees to give out to the Public, such a situation of temptation to not hold the balance nice, clear, and true, that recusal of the California State Supreme Court Justices was and is required under the due process clause?[5]

B. Administrative Adjudicators Selected, Hired, and Employed by a Party Which is the Exclusive Financial Beneficiary of Findings Against Accuseds Poses Due Process Problems

Pursuant to this Court's holding in **Ward v. Village of Monroeville** 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d.267 (1972), State Supreme Court review of an adjudicatory proceeding in a lower level which lacked a fair and impartial adjudicator denies to a party fundamental due process of law. A party has a constitutional right to a fair and impartial adjudicator in the first instance, *de novo* review being irrelevant. Proceedings conducted by members of a Board of a State Bar Association wherein they

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[5] There is no Rule of Necessity. The California Constitution provides any case may be transferred by the California Supreme Court to a State Court of Appeals. Article 6, section 12, Ca. Constitution.

desired to recoup the Association's investigative costs by finding guilt of accuseds and imposing those costs upon the adjudged guilty attorneys were voided for lack of due process of law. **Matter of Ross** 656 P. 2d. 832, 838, 99 Nev.1 (Nev. 1983).

Is not the fact that the hearing and review judges are selected, hired, and employed by the prosecuting party, the State Bar of California, and retain their judgeships, which amount to approximately $150,000 each annually, only if they adjudge attorneys guilty and obtain monies from their guilty adjudications for the State Bar, such a role of partisanship for a party and financial beneficiary, that due process is violated by reason of a lack of a fair and impartial adjudicator in the California State Bar licensing system?

Of note is that the attorney was ordered to repay monies in excess of the loan amount (over $20,550) to the State Bar's Client Security Fund if the sums were not paid to the estate of Margie Brown within two years. This way the State Bar and the California Supreme Court's appointees may give out the $20,550 to anyone they please in the Public and aggrandize their public

image and the success of its Client Security Fund. The State Bar finds guilt to get the money for itself. Section 6086.13 authorizes the State Bar to order $5,000 a violation, or up to a maximum of $50,000, for its Client Security Fund payable from each attorney it finds guilty. App. B-4. This is in addition to the collection of its employee judges, prosecutors, investigators' and staff's salaries and benefits on a time-expended basis, which in this case, will exceed an additional $10,000 since the attorney insisted on her innocence and went to trial. App. A-2, B-3.

C. Privately Financed Prosecutors who Obtain Funds for their Privately financed Employer by Prosecuting Accuseds Poses Due Process Problems

Pursuant to this Court's holding in **Berger v. United States** 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. ed. 2d. 1314 (1935), "Private attorneys appointed to prosecute a criminal contempt action represent the United States, not the party that is the beneficiary of the court order allegedly violated.....A prosecutor may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client....Prosecution by someone with conflicting

loyalties `calls into question the objectivity of those charged with bringing a defendant to judgement... appointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general. ..If a prosecutor uses the expansive prosecutorial powers to gather information for private purposes, the prosecution function has been seriously abused even if, in the process, sufficient evidence is obtained to convict a defendant."

In **Shaw v. Garrison** 467 F. 2d. 113 (Fifth Cir. 1972), cert. denied, a public prosecutor had obtained funds from friends and others to prosecute an alleged co-conspirator in the murder of President John F. Kennedy. After acquittal of the defendant on the murder charges, the prosecutor commenced a perjury prosecution against the defendant. He was enjoined from prosecuting the defendant by the federal court. A citizen has the right to be prosecuted only in good faith. A prosecutor who prosecutes to obtain funds to reimburse associates for funds advanced and to benefit a book deal he has is prosecuting a citizen in bad faith. His cloak of public duty is conflicted with

private interest.

The State Bar prosecutors and their examiners prosecute to obtain monies to benefit their private employer so as to aggrandize their positions with their employer. If they do not prosecute, they do not get the monies. If they do not get the monies, they are fired. Their loyalty is owed, not to the Public's interest in prosecuting attorneys for professional misconduct, but in selectively prosecuting solo private practitioners, preferably minority attorneys, over non-existent wrongs or *de minimis* wrongs. These yield fast cash for their private employer.

The fact that the Notice to Show Cause admittedly had no evidence to support it, that none of the noticed charges were sustained, that all of the charges were added after the trial without notice or trial, indicates the State Bar prosecutes with no hope of obtaining valid convictions, but solely to harass attorneys into paying its private employer the monies it wants for itself. Refer sections 6086.10(b), 6086.13, App. B-3, B-4.

When the State Bar is the exclusive financial beneficiary of each prosecution and the State and the taxpayers receive no

monies from these prosecutions, are these not bad faith prosecutions for financial gain and benefit that violate due process of law?

D. The Admitted Unconstitutionality of the State Bar's Court for Depriving the Petitioner of Her Right to Vote Compels Voiding of the Judgment Based on Proceedings Conducted Therein

It is undisputed that the California voters abolished all authority in State Government to create new courts in 1966. The voters reserved court creation to themselves by constitutional amendment. Article 6, section 1, California Constitution. The statute passed in 1986 permitting the State Bar to create a State Bar Court is well-recognized to be unconstitutional. The legislature has had no authority to create new courts since 1966. Section 6086. 5. The California Constitution has required the State Bar to be a public corporation since 1966. Article 6, section 9, California Constitution. Judges to State Courts must be elected by the voters. Article 6, section 16, California Constitution. The Governor fills interim vacancies. Article 6, section 16, California Constitution. The statutes and rules of the California Supreme Court authorizing it to appoint judges to a

State Bar Court which bar public election of these judges divests the Petitioner of her rights to the equal protection of state law which provides she votes to create the state courts, the Governor fills interim vacancies in judgeships, and the Petitioner elects all judges thereto.

Similar to **Kramer v. Union Free School District No. 15**, 395 U.S. 621, 627 (1969), is not the "fencing out" of the franchise constitutionally guaranteed to the Petitioner as a registered voter a denial of equal protection of the law, such that the proceedings conducted by an admittedly unconstitutional private court and unconstitutional private judges must be declared void, requiring that the judgment based on proceedings in this unconstitutional private court must be vacated for just cause?

E. The Moral Turpitude Ethics Statute Sweeps Unnecessarily Broadly and Has no Limiting Construction Posing Overbreadth and Vagueness Due Process Problems

Section 6106, first approved in 1872 and never revised or

limited,[6] states, "The commission of any act of moral turpitude, dishonesty, or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." The peril to protected first amended activity derives from the fact that the terms "moral turpitude, dishonesty, or corruption" have "no settled usage or tradition of interpretation in [the] law." **Gentile v. v. State Bar of Nevada** 501 U.S. 1030, 115 L. Ed. 2d. 888, 111 S. Ct. 2720 (1991), at 2731.

On February 6, 1992 the American Bar Association voted

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6 In explaining why the California Supreme Court has declined to limit the definition of moral turpitude, dishonesty, or corruption, it stated," `The definitions of `act involving moral turpitude' are frequent and repetitious. The simplest is that act contrary to honesty and good morals is conduct involving moral turpitude.' **Stanford v. State Bar** (1940) 15 Cal. 2d. 721 , 727 [107 P. 2d. 635]. (1 Witkin Cal. Procedure (2d. Ed. 1970) at p. 205.) This broad definition is intended to give the State Bar and this court broad discretion in determining what acts will be deemed to involve moral turpitude and in applying the statutory provisions concerned with such acts." (Id.) **Kitsis v. State Bar** 23 Cal. 3d. 857, at 865; 153 Cal. Rptr. 836, 592 P.2d. 323 (1979).

to disapprove the California attorney licensing system. The California ethics rules are A.B.A.-rejected. The American Bar Association ordered "moral turpitude" deleted from the Model Rules of Professional Responsibility approximately twenty seven years ago. The A.B.A. comments state, "the Model Rules also eliminate the troublesome `moral turpitude' standard... This standard has been broadly defined as `an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man'... That the standard was manifestly ambiguous is evidenced by the wide ranging interpretations given it by the courts." A.B.A. Annotated Model Rules, Rule 8.4 Misconduct, Comment, at 353.

The State Bar employees claim that the moral turpitude is that, "Respondent's procurement of the loan and retention of the balance of the settlement funds constituted acts of moral turpitude and dishonesty." App. E:19. Petitioner entered into a lawful written loan with her sister-in law. Her loan was not an act of moral turpitude. It was not a *malum in se* nor a *malum*

prohibitum. The sweep of protected activity quashed, suppressed, and punished, without advance notice to an attorney, by an elasticized and ever expanding "moral turpitude" standard applied *ad hoc* to accommodate the State Bar's financial interests in proceedings poses due process problems indicating the statute is unconstitutional for both overbreadth and vagueness, as applied.

F. The Publication by the Prosecuting Party of Its Recommendations as a Court Decision Prior to Court Access and Finality of its Recommendations Poses Due Process Problems of Fraud and Prejudicial And Inflammatory Pre-Judgment

The State Bar, exempt from state law under section 6002, but prohibited constitutionally from publishing its findings as decisions or citing itself as precedent, none-the-less has done so for four years in *ex parte* collaboration with the State Supreme Court which wants it to assume its licensing function for it and has no interest in enforcing constitutional prohibitions on its appointees to the State Bar. Article 6, sections 9, 14, California Constitution. App. E. Refer pages 10-11, fts. 3 and 4.

The publication of the State Bar employees'

recommendation as a decision in the state-wide press as that of a Court of Law is prefaced with inflammatory, prejudicial, and inaccurate statements. It panders to the Public's desire to have lawyers called epithets. The degradation of the legal profession by the State Bar for its own financial profit is a goal it pursues while it conceals from the Public its financial profiteering from such humiliation inflicted on the State's lawyers.

The State Bar's published "decision," which is not a decision, but is solely a recommendation, starts in big letters with, ***"Counsel's Overreaching at Expense of Sister-in-law with Poor Health and Low Income Justifies Suspension."*** The palming off of a an advisory act, as if it were a final decision, when no decision had been issued, and no court access permitted yet, is part of the deception the State Bar has perpetrated.

The published decision states it is issuing from the "Review Department of The State Bar Court." App. E:1. There is no State Bar Court. The California Constitution permits only a State Supreme Court, Court of Appeals, Superior Courts, Municipal Courts, and Justice Courts. Article 6, section 1,

California Constitution. The State Bar is limited constitutionally to being and holding itself out as a public corporation, but its recommendations are published as those of a State Bar Court, when no such entity is permitted to exist within the State and when it is admitted such a State Bar Court is an unconstitutional entity. Article 6, section 9, California Constitution.

The conclusion of the published decision indicates this claimed State Bar Court is entering the order of suspension, when the State Bar has no constitutional authority, as a public corporation, to enter orders of any kind. [7]

The recommendation commences with, "This case involves an attorney who exploited a vulnerable, impecunious relative by improperly borrowing and not repaying the bulk of the proceeds of a personal injury settlement obtained by the attorney

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7 The conclusion of the published State Bar decision states, "We adopt the remainder of the hearing judge's discipline recommendation, as modified, including the requirements that respondent pass the California Professional Responsibility Examination prior to the expiration of her actual suspension; that she comply with the provisions of Rule 955, California Rules of Court, and that she pay costs as ordered by the California Supreme Court." Perlman, P.J. We concur. Norian, J. Stovitz, J.

on her behalf..... We agree that two years of actual suspension and restitution constitute fitting discipline for respondent's overreaching at the expense of her sister-in-law, now deceased, a woman of limited income, in poor health, who lacked sophistication in business matters." App. E:1.

The offense here is obtaining a loan from a close relative. The loan was in writing. It was signed by the relative. It provided for ten per cent interest and full payment in five years. The Petitioner was unable to repay the sums in full, but made payments on the amount due. There is no ethics rule that says a good loan becomes a bad loan because of the mental, emotional or physical status of the lender. There is no ethics rule that defines "overreaching" or makes "overreaching" a sanctionable offense, yet the two year open-ended suspension is based solely on a claim to that which was not charged, is not an offense, and has no definition, to wit, a claim of " overreaching."

This Court has held in **Sheppard v. Maxwell** 384 U.S. 333, 86 S. Ct. 1507 that publicity surrounding a trial may be so inflammatory, prejudicial, histrionic, and unfair that it denies an

accused the right to a fair trial. This publication, illegal and unconstitutional, misleading, deceptive, subjective, and inflammatory, pandering to the Public, indicative of the race stereotyping and hatred the State Bar foments within the State, admits there was no due process in the proceedings. This publication causes not only the Public, clients, lawyers, and judges to prejudge the accused's guilt but it renders the actual rendering of an independent decision by the State Supreme Court a non-existent right. This published recommendation forces a prejudgment of the accused's guilt, especially since it is published as a state-wide Court decision prior to any access to a court.

Does not the inflammatory publication deny to the Petitioner her rights to fundamental due process of law and to untainted proceedings within a court of law prior to a taking of her license to practice law?

///

G. Is not a Business Transaction Rule which requires the Transaction be Fair and Reasonable to the Client, That the Terms in Writing Should be Reasonably Understood by the Client, and that a Client be Advised he May Seek the Advice of anIndependent Lawyer, Unconstitutional as applied to a claim the State Bar Would have made a Different Loan, the Attorney had to make sure each Term was Fully Known and Understood, the Client was in Poor Health and Unsophisticated, and the Attorney had to Tell Client to Go to an Independent Attorney?

The State Bar employees took a rule which admittedly was not violated and made up *ad hoc* its own new rules of strict liability. App. B-7, E-16-E-19.

Former rule 5-101 required that a client with whom an attorney enters into a business transaction be "given a reasonable opportunity to seek the advice of independent counsel of the client's choice on the transaction." App. B-7. The State Bar employees' decision claims the guilt is that the attorney "was obligated to go beyond informing Ms. Brown that she had a right to consult another attorney and was required to advise her to do so." App. E-19.

Former rule 5-101 concerning business transactions between attorney and client provided that the terms of the

transaction must be transmitted in writing to the client in "manner and terms which should have been reasonably understood by the client." App. B-7. The decision of the State Bar employees claims the guilt is that attorney is "obligated to insure that the terms and conditions of the loan were fully known and understood" by the client. App. E-18

Former rule 5-101 concerning business transactions between attorney and client provided that the terms must be " fair and reasonable to the client." App. B-7. The decision of the State Bar employees' claims the attorney's guilt is that the State Bar employees would have made the loan a secured loan and that the client's "poor health, frequent use of alcohol, lack of sophistication in business matters, and limited education" made the loan not fair and reasonable to her. App. E-1, E-18. This is the typical stereotype of the poor black boozing moron the State Bar encourages in the State as it libels the dead. This was a woman who knew the attorney as her sister-in-law for over thirty eight years. There was no evidence she used alcohol in entering into the loan. There was no evidence of unfair or unreasonable

to the client. The question of fair and reasonable to the client has to be based on an objective analysis of the client's viewpoint.

The loan was in simple language, reasonably understood by anyone, evidenced by a promissory note and a loan agreement. It was fair and reasonable from the client's viewpoint as she never objected to it while she was alive and willingly signed it. With a thirty eight year relationship between Petitioner and her sister-in-law, there were many profound close ties and debts of gratitude over those thirty eight years that goes into an objective view of whether the loan was fair and reasonable to the client. But the subjective, and financially inspired, views of the State Bar clearly exceed a reasonable interpretation of the language of the rule. What it would have done is not the guilt that may be imposed. What the rule actually required must be the basis of guilt, not speculation, surmise, racial stereotyping, conjecture, and pandering by those who are financially inspired.

As held in **Big Mama Rag Inc. v. United States** 631 F.2d. 1030 (D.C. 1980) at p. 1037, "statutes phrased in terms of individual sensitivities are suspect and susceptible to attack on

vagueness grounds...." See **Kramer v. Price** 712 F. 2d. 174, 177 (Fifth Cir. 1983). When a taking or denial of a license is "comprised [of] purely subjective evaluations of wholly unrestricted factors,..." **Big Mama Rag** at 1123, thereby imposing an unconstitutional standard where a license is necessary for the exercise of a right or privilege, it has been held to be unenforceable for unconstitutionality.

Does it not deny due process for private employees of a prosecuting party to take the facial language of a rule, ignore it, make up new rules on their own after the fact and by way of a finding of guilt, as such sweeps unnecessarily broadly into areas of protected conduct without advance notice, is applied to a substantial amount of protected conduct, and is fundamentally unfair?

H. The fact The Loan was Made before the Settlement Received and the Attorney Paid the Client's Funds Out of her own Funds before Receipt indicates NoTrust Account Violation Occurred and the Rule is Unconstitutional for Financial Interest and Overbreadth

Former rule 8-101(A) provided that "All funds received or held for the benefit of clients by a member... shall be deposited

in one or more identifiable bank accounts labelled (sic) "Trust Account... Former rule 8-101(B)(4) provided that "A member of the State Bar shall ...promptly pay or deliver to the client as requested by the client the funds, securities, or other properties in the possession of the member of the State Bar which the client is entitled to receive."

The Notice alleged these violations were based on misappropriation of funds and of non-payment to a doctor for a lien. App. F. However, orally at hearing this Notice and the charges were dismissed. New and unidentified oral charges were made instead. The State Bar's decision recommending suspension claims that "Respondent contends that she did not violate former rule 8-101(A) in that all funds had changed character from trust funds into personal funds prior to her receipt thereof. ... Nevertheless, since there was a mixed character to the funds, respondent was obligated to place the settlement proceeds into her trust account and thereafter dispense the $700.00 owed to her client promptly. There is no doubt that Ms. Brown made a demand for funds. Respondent's failure to place the settlement

proceeds in a trust account and to pay the remainder promptly to Ms. Brown violated the trust account rules." App. E-25.

There was no evidence of a violation of former rule 8-101(B)(4). There was no evidence of a demand for the funds by Ms. Brown. She was deceased and there was no record of any demand and she had already executed the loan documents. It is not evidence to claim,"There is no doubt that Ms. Brown made a demand for funds," when such conjectures and surmise are made up solely to find guilt in order to obtain money from the accused for the judge's salary and benefits and for his co-employees.

Former rule 8-101(A) required deposit of a client's funds in a trust account. However, the loan had already been executed and the attorney had already paid Ms. Brown her share of the settlement from her own funds, so that the settlement funds, when received, no longer had a mixed character. They were personal funds of the attorney by way of loan and payment of legal fees. Since the State Bar confiscates the interest monies on all monies in all trust accounts for itself, its finding of guilt was

not based on a violation of the rule, but on its desire to force lawyers to put all monies they receive into a trust account where the State Bar may monthly confiscate all the interest monies for itself. Section 6211.

When an entity has a financial interest, not only in the outcome of an adjudication of guilt, but in enforcement of a specific rule from which it also financially benefits, does not this disqualify the entity deciding its own financial interest issues, and is not this application unconstitutional for lack of due process of law?

I. The Taking of Licenses based on Charges Never Filed or Heard Denies Due Process of Law

It is undisputed that the Notice served on the attorney contained charges that were not proven. App. F. Instead, the State Bar employee made up new ones orally, and the decision rests exclusively on charges never filed. App. E. Pursuant to this Court's decision in **In re: Ruffalo** 390 U.S. 544, 88 S. Ct. 1222, 20 L.Ed.2d. 117 (1968), is this not a denial of due process of law?

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CONCLUSION

A state system of attorney licensing that operates on layers of undisclosed private, partisan, and financial interests within private prosecutors, investigators, and judges does not provide confidence to the Public that lawyers are properly licensed.

The Petition should be entertained to address issues concerning due process requirements concerning fair and impartial adjudicators within a State Supreme Court and administrative adjudicators, financial interests within private prosecutors, the unconstitutionality of a private, for profit Court owned and run by a private prosecuting party, publication of an inflammatory and prejudicial nature of a recommendation of a party's employees as a claimed Court decision prior to court access, facial overbreadth and vagueness of "moral turpitude," the business transaction rule, and trust deposit and payment rules for lack of fair notice, and whether this system with thousands of attorney takings based on charges never filed and an over fifteen million dollar profit to a State Bar from the takings shall continue

infects and contaminates the legal system of the State [8].

RESPECTFULLY SUBMITTED,

Dated: September 5, 1995

LILLIAN BROWN JOHNSON
Petitioner Attorney *Pro Se*

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[8] To prevent the federal court declaring its licensing system unconstitutional, the State Bar hired sitting Ninth CircuitCourt of Appeals' Judge Arthur Alarcon to author and publish State-wide a report called "The Alarcon Report," in support of its private, for profit State Bar Court. As a result, the Ninth Circuit has refused to hear or decide any cases concerning the constitutional issues. This suggests that all a party has to do in the State of California is hire a federal Circuit Court judge.

Verification

I have read the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of California and state it is made on my own personal knowledge, information, and belief, and this verification is executed this 5th day of September, 1995 at Los Angeles, California.

RESPECTFULLY SUBMITTED,

Dated: September 5, 1995

LILLIAN B. JOHNSON
Petitioner Attorney *Pro Se*

No. 95-1231

Supreme Court, U.S.
FILED
SEP 6 1995
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

LILLIAN BROWN JOHNSON

Petitioner

vs.

THE STATE BAR OF CALIFORNIA

Respondent

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF CALIFORNIA

LILLIAN BROWN JOHNSON
P. O. Box 19-1191
Los Angeles, California 90019

1-310-826-2180

Petitioner Attorney *Pro Se*

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S0469247
SBC: 86-0-12794

SUPREME COURT
FILED
AUG 10, 1995
Robt Wandruff Clerk
DEPUTY

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

IN THE MATTER OF LILLIAN BROWN JOHNSON ON DISCIPLINE

"Petition for disqualification," etc., and petition for writ of review are denied.

It is ordered that Lillian Brown Johnson be suspended from the practice of law for five years, that execution of suspension be stayed, and that she be placed on probation for five years on condition that she be actually suspended for two years and until she has made restitution to the estate of Margie Brown (or the Client Security Fund, if appropriate) in the sum of $20,550, plus 10% per annum from October 14, 1986, and until

she has shown proof satisfactory to the State Bar Court of her rehabilitation, fitness to practice and learning and ability in the general law pursuant to Standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. She is further ordered to comply with the other conditions of probation recommended by the Review Department of the State Bar Court in its opinion filed January 23, 1995. It is also ordered that she take and pass the California Professional Responsibility Examination during the period of her actual suspension. (See Segetti v. State Bar (1976) 15 Cal.3d 878, 891, fn. 8.). She is further ordered to comply with rule 955, California Rules of Court, and perform the acts specified in subdivisons[sic] (a) and (c) of that rule within 30 and 40 days, respectively, after the date this order is effective.* Costs are awarded to the State Bar and shall be added to and become part of the membership fee for the next calendar year. (Business and Professions Code section 6140.7.) See Business and Professions Code section 6126, subdivision (c).

Lucas
Chief Justice

STATE STATUTES

THE STATE BAR ACT

California Business and Professions Code

SECTION 6001. STATE BAR; PERPETUAL SUCCESSION; SEAL; REVENUE; POWERS; LAWS APPLICABLE

The State Bar of California is a public corporation. It is hereinafter designated as the State Bar.. . .No law of this state restricting, or prescribing a mode of procedure for the exercise of powers of state public bodies or state agencies, or classes thereof, including, but not by way of limitation, the provisions contained in Division 3 (commencing with section 11000), Division 4 (commencing with section 16100), and Part 1 (commencing with section 18000) and Part 2 (commencing with section 18500) of Division 5, of Title 2 of the Government Code, shall be applicable to the State Bar, unless the legislature expressly so declares. (Origin: State Bar Act, sec. 2. added by Stats. 1939, ch 34. Amended by Stats. 1957, ch. 1526; Stats. 978, ch. 380; Stats. 1988, ch. 1149.)

SECTION 6079.1 STATE BAR COURT HEARING JUDGES

(a) The Supreme Court shall appoint a presiding judge of the State Bar Court and no fewer than seven hearing judges, and any additional hearing judges as may be authorized by the Legislature, to efficiently decide any and all regulatory matters pending before the Hearing Department of the State Bar Court. .. (c) The board shall screen and rate all applicants for appointment or reappointment as a State Bar Court judge, and submit its nominations to the Supreme Court, unless otherwise directed by the Supreme Court. . .

(d) For judges appointed pursuant to this section or Section 6086.65, the board shall fix and pay reasonable compensation and expenses and provide adequate supporting staff and facilities.

SECTION 6079.5 CHIEF TRIAL COUNSEL; APPOINTMENT; TERM; QUALIFICATIONS

(a) The board shall appoint a lawyer admitted to practice in California to serve as chief trial counsel. . .

SECTION 6086.5 STATE BAR COURT; ESTABLISHMENT; POWERS; RULES

The board of governors shall establish a State Bar Court, to act in its place and stead in the determination of disciplinary and reinstatement proceedings and proceedings pursuant to subdivisions (b) and (c) of section 6007 to the extent provided by rules adopted by the board of governors pursuant to this chapter.

SECTION 6086.10 PAYMENT OF COSTS OF DISCIPLINARY PROCEEDINGS

(a) Any order imposing a public reproval on a member of the State Bar shall include a direction that the member shall pay costs. In any order imposing discipline, or accepting a resignation with a disciplinary matter pending, the Supreme Court shall include a direction that the member shall pay costs.

(b) The costs required to be imposed pursuant to this section include all of the following:

(1) The actual expense incurred by the State bar for the original and copies of any reporter's transcript of the State Bar proceedings, and any fee paid for the services of the reporter.

(2) All expenses paid by the State Bar which would qualify as taxable costs recoverable in civil proceedings.

(3) The charges determined by the State Bar to be "reasonable costs" of investigation, hearing, and review. These amounts shall serve to defray the costs, other than fees for the services of attorneys or experts, of the State Bar in the preparation or hearing of disciplinary proceedings, and costs incurred in the administrative processing of the disciplinary proceedings and in the administration of the client security fund...

(d) In the event an attorney is exonerated of all charges following a formal hearing, he or she is entitled to reimbursement from the State bar in the amount determined by the State bar to be the reasonable expenses, other than fees for attorneys or experts, of preparation for the hearing. (Added by Stats. 1986, ch. 662.)

SECTION 6086.13 IMPOSITION OF MONETARY SANCTION IN DISCIPLINARY MATTER .

(a) Any order of the Supreme Court imposing suspension

or disbarment of the member of the State Bar, ...may include an order that the member pay a monetary sanction not to exceed five thousand dollars ($5,000) for each violation, subject to a total limit of fifty thousand dollars.

(b) Monetary sanctions collected under subdivision (a) shall be deposited into the Client Security Fund.

....

(d) The authority granted under this section is in addition to the provisions of Section 6086.10 and any other authority to impose costs or sanctions....

SECTION 6106 MORAL TURPITUDE, DISHONESTY OR CORRUPTION IRRESPECTIVE OF CRIMINAL CONVICTION

The commission of any act of moral turpitude, dishonesty, or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.

SECTION 6140.7 DISCIPLINARY COSTS ADDED TO MEMBERSHIP FEE

Costs assessed against a publicly reproved or suspended member shall be added to and become a part of the membership fee of the member, for the next calendar year. Costs unpaid by a member who resigns with disciplinary charges pending or by a member who is suspended of disbarred shall be paid as a condition of reinstatement of membership.

SECTION 6211. DEFINITION OF FUNDS TO BE DEPOSITED IN INTEREST BEARING DEMAND TRUST ACCOUNT; INTEREST EARNED PAID TO STATE BAR; OTHER ACCOUNTS OR TRUST INVESTMENTS; RULES OF PROFESSIONAL CONDUCT; DISCIPLINARY AUTHORITY OF SUPREME COURT OR STATE BAR

(a) An attorney or law firm, which is the course of the practice of law receives or disburses trust funds, shall establish and maintain an interest bearing demand trust account and shall deposit therein all client deposits that are nominal in amount or are on deposit for a short period of time. All such client funds

may be deposited in a[n].unsegregated account. The interest earned on all such accounts shall be paid to the State Bar...

CALIFORNIA RULES OF PROFESSIONAL CONDUCT; FORMER RULE 5-101: "A member shall not enter into a business transaction with a client...unless (1) the transaction and terms in which the member of the State Bar acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in manner and terms which should have reasonably been understood by the client, 2) the client is given a reasonable opportunity to seek the advice of independent counsel of the client's choice on the transaction, and 3) the client consents in writing thereto. "

FORMER RULE 8-101(A): "All funds received or held for the benefit of clients by a member... shall be deposited in one or more identifiable bank accounts labelled (sic) "Trust Account... (B)(4): "A member of the State Bar shall ...promptly pay or deliver to the client as requested by the client the funds, securities, or other properties in the possession of the member of the State Bar which the client is entitled to receive."

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE LILLIAN BROWN JOHNSON,

Petitioner,

vs.

THE STATE BAR COURT OF THE STATE BAR OF CALIFORNIA,

Respondent.

No. S046247

(St., Bar Ct., No. 86-O-12794)

PETITION FOR REVIEW OF DECISION

SUPREME COURT

FILED

JUN'27

Robert Wandruff Clerk

DEPUTY

LILLIAN B. JOHNSON, No. 64247
P. 0. Box 19-1191
Los Angeles, California 90019
(1-310) 826-2180

In Propria Persona

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE LILLIAN BROWN JOHNSON,

Petitioner,

NO. S

(St. Bar Ct. No. 86-0-12794)

vs.

THE STATE BAR COURT OF THE STATE BAR OF CALIFORNIA,

Respondent.

PETITION FOR REVIEW OF DECISION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rule 28 of the California Rules of Court, petitioner, LILLIAN B. JOHNSON, respectfully requests that this Court review the opinion of Review Department and its

summary denial of petitioner's Motion for Reconsideration, Supplement to Motion For Reconsideration, and Amendment to Supplement to Motion for Reconsideration. Copies of the State Bar Court of the State Bar of California denials dated March 6, 1995, March 21, 1995, and June 19, 1995, respectively, are attached hereto as Exhibits H, I, and J.

Review is sought pursuant to Rule 29(a) of the California Rules of Court, to settle important questions of law.

ISSUES ON REVIEW

In order for the State Bar Court to be legally in a position to find culpability under Rules 5-101 and Section 6106 of the State Bar Rules of Professional Conduct, the accused attorney must be legal notice of the prohibitive conduct these rules strike. It is necessary to settle this important question of law.

The evidence submitted in support of a finding that the accused attorney violated Rule 8-101 is legally insufficient and fails both the competent and "clear and convincing" tests. Accused attorney is denied due process of law because accused attorney's hearing was heard by a solo judge who did not reveal

his financial interests in the outcome of the hearing.

Chief Trial Counsel (prosecutor) did not reveal his/her financial interests in the outcome of the hearing.

The evidence does not support the decision, and does not meet the standard test of "clear and convincing" with all reasonable doubts resolved in favor of the accused.

The State Bar Court published its advisory decision on January 25, 1995, in the Daily Journal Appellate Report which prejudicial publication denies accused attorney's right to a fair review before the State Supreme Court.

Accused attorney is a registered voter and a licensed member of the State Bar of California, is denied her right to vote and select the nine (9) judges which are appointed by the State Supreme Court Justices which forces an attorney to forfeit her right to vote in order to be licensed by the State Supreme Justices. The State bargaining one right in order to have another denies due process of law to the accused attorney.

The accused attorney is denied equal protection of law when she is not subject to any of the protection afforded other

professionals in state-disinterested prosecutors, hearing persons, persons subject to control by the Judicial Commission, the Judicial Code, the Judicial Council and the prohibition on inflammatory pre-hearing/review releases issued by the State Bar Court.

The recommended discipline is excessive and inappropriate in light of the record as a whole.

NECESSITY FOR REVIEW

On September 23, 1992, hearing in this matter was commenced in the hearing department of the State Bar Court. On June 28, 1993, said hearing was concluded. On March 26, 1994, petitioner filed an opening brief in the review department of the State Bar Court. On June 29, 1994, petitioner made oral argument before the review department of the State Bar Court. That at the close of said argument, the Court granted petitioner leave to file an Additional Trial Argument" brief. That petitioner filed a Respondent's Brief on July 28, 1994. That Trial Counsel filed a "Response." That on September 9, 1994, petitioner filed an opposition to Motion to Strike filed by the Trial Counsel.

That petitioner filed a Petition for An Order to Augment or Correct Record on Appeal on September 10, 1994. That Trial Counsel filed a Response to Supplemental Declaration to Petition for An Order to Augment or Correct Record on Appeal on September 30, 1994. That the review department of the State Bar Court filed its opinion on Review on January 23, 1995. That petitioner filed a Notice of Motion and Motion For Reconsideration of Review Department's Decision, etc., on February 3, 1995. [Cal. Rules of Ct., Rule 3(a), (b)]. That the Trial Counsel filed Opposition to Motion for Reconsideration on February 21, 1995. The Review Department filed its ruling denying Motion for Reconsideration on March 6; denied the Supplement to Motion for Reconsideration on March 21, 1995.

The threshold issues here are whether petitioner is denied due process of law under both the United States and State Constitutions by and through the Fourteenth Amendment.

The accused attorney has been denied due process of law under the following:

1. That a solo justice sitting alone as hearing judge failed

to disclose that he had a financial interest in the outcome of the hearing. The hearing was not conducted by an impartial hearing judge.

2. The Chief Trial Counsel (prosecutor) failed to disclose his financial interests in the outcome of the hearing.

3. Evidence upon which a decision rests is not competent and does not meet the "clear and convincing" standard to satisfy the right of fair hearing.

4. Accused attorney is a registered voter and as a licensed attorney, the State Supreme Court Justices appointed nine (9) State Bar court "judges" and the State Bar Board of Governors, who selected the prosecutors, has forced accused attorney to forfeit her right to vote to create the courts and elect and remove their judges, denies accused attorney due process of law.

5. Accused attorney is not given legal notice of prohibitive conduct by the language contained in rules 5-101 and 8-101 and section 6106; culpability cannot constitutionally sustained pursuant to language contained therein.

6. The State Bar Court published a decision on January 25,1995, that accused attorney had been tried in said court and finds the accused attorney committed violation under rule 5-101 and section 6106, etc. constitutes a denial of accused attorney's right to a fair and impartial review on this matter before the Justices of the State Supreme Court.

7. The accused attorney is denied equal protection of laws when she is not subject to any of the protection afforded other professionals in state-disinterested prosecutors, hearing persons, persons subject to control by the judicial Commission, the Judicial Code, the Judicial Council and the prohibition on inflammatory pre-hearing/review releases issued by the State Bar Court.

8. The factors in mitigation, pro bono services should be considered.

9. The recommended discipline is excessive and inappropriate in light of the record as a whole.

ARGUMENT

I.

WHETHER THE STATE OF THE EVIDENCE SUPPORTS VIOLATIONS OF RULE 5-101 AND SECTION 6106 AND WHETHER LANGUAGE CONTAINED THEREIN IS CONSTITUTIONALLY LEGAL.

Former Rule 5-101 reads as follows:

A member of the State Bar shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless (1) the transaction and terms in which the member of the State Bar acquires the interest are fair and reasonable to the client and are fully disclosed [and]transmitted in writing to the client in manner and terms which should have reasonably been understood by the client, (2) the client is given a reasonable opportunity to seek the advice of independent counsel of the client's choice on the transaction, and (3) the client consents in writing thereto.

The United States Constitution, Fifth Amendment and the

Fourteenth Amendment which makes these amendments applicable to the states guarantees a right of legal notice of the prohibitive conduct. Petitioner takes the position that the above-cited rule does not give legal notice. The language contained therein is ambiguous and overly broad. The use the term "business transaction". The attorney in representing clients is required by State Bar Canons to enter into a contract be it oral or written for whatever representation the client will receive from the attorney under terms and conditions. This is a "business transaction". Therefore, the term "business transaction" is ambiguous and overly broad. With respect to the term "pecuniary interest adverse to a client. . . .", this term is ambiguous and seems to include even the transactions where the attorney represents a client on a contingency basis. Where the client has suffered an automobile accident and the insurance company is slow settling the case, the attorney first of all enters into a contract with the client and the contract generally provides for attorney's fees at one-third (1/3) per cent, forty (40) per cent, or in some instances, fifty (50) per cent of the gross recovery. In

this case the petitioner testified that petitioner had telephone conferences during the week of September 15, to September 19, 1986, with the client regarding the loan agreement and its terms. [R.T. Vol. VII, 67:18-25]. [Reporter Transcript, Volume No. VII, page 67, lines 18 through 25]. The record is void of any testimony from a witness called by the Trial Examiner that said telephone conferences did not occur. The writing, petitioner's Exhibit B, reflects the terms of said telephone conferences as memorialized. The rule appears on its face to impose "strict liability" upon a violator.

Assuming arguendo, that the above-cited rule is not unconstitutionally vague, ambiguous, or overbroad, petitioner contends that she has satisfied the elements of the rule; to wit: petitioner had conferences with client during the week of September 15 through 19, 1986. We discussed fully the terms of the "Agreement." The agreement was fair and reasonable under the circumstances existing in that time frame. The petitioner had an accounts receivable in the approximate amount of $100,000. The client was in communication with petitioner as stated.

Certainly, the client consented in writing as reflected in Exhibit "B". Federal and state statutes are well-settled, and there is a vast body of law which has interpreted statutes and case law, and it is crystal clear that every conviction under a statute which is vague, ambiguous, and overbroad on its face or as applied to the "prohibitive conduct" is constitutionally void.

Section 6106: Moral Turpitude

> The act of baseness, vileness, or depravity in private and social duties which man owes to his fellow man or to society in general, contrary to accepted and customary rule of right and duty between man and man. State v. Adkins, 40 Ohio App.2d 473, 320 N.E.2d 308, 311 69 0.0.2d 416. The quality of a crime involving grave infringement of moral sentiment of the community as distinguished from statutory mala prohibits. Black's Law Dictionary, Sixth Ed., pp. 1008, 1009

The language contained in the definition of one possessing a lack of "moral turpitude" is ambiguous and overly broad. Because of such a broad-sweeping concept of what constitutes a

lack of moral turpitude, any act that is considered against a code of conduct, may be deemed an act that constitutes a lack of moral turpitude. The person is not put on legal notice of any specific act or acts that are prohibited by such a broad sweeping definition.

In the instant case, the review department contends that petitioner engaged in overreaching in entering into a "business transaction" with her client. The question become whether overreaching occurred at the time the contract was entered into by the parties, or is overreaching determined on subsequent changes in petitioner's financial reverses. Petitioner testified that petitioner's client was cashed on the date the "Agreement" was executed. The testimony the Trial Examiner presented on that issue was the testimony of Sandra Brown, "Did your mother tell you that Lillian Johnson gave her $700." [R.T., Vol. IV, 150:3-5, 8-101. No violation occurred.

II.

WHETHER PETITIONER IS DENIED DUE PROCESS OF LAW BY REASON OF SOLO "HEARING PERSON'S" FINANCIAL INTERESTS IN THE OUTCOME OF HEARING.

On September 23, 1992, a hearing in this matter was commenced. That said hearing phase of this matter concluded on June 28, 1994. That hearing person was Christopher W. Smith, appointed by the Justices of the State Supreme Court. That said hearing person's compensation (salary) is paid from the costs imposed upon attorney's who either "buy out" or his found guilty in his matter. That the law is clear in order to remove any semblance of a conflict of interest, there must be a disclosure of an interest in the proceedings a "hearing person" [State Bar Court Judge] hears and the accused attorney must be afforded an opportunity to waive the judge's conflict of his financial interests in the outcome of the hearing. That his salary is paid from the costs imposed by the "hearing person". That the State Supreme Court Justices have authority to fix the compensation of the

"hearing person" judges of the State Bar Court which was created as a subordinate to the State Supreme Court. The Trial Examiner [Chief Trial Counsel] deputy never disclosed her financial interests in the outcome the hearing, nor did she give petitioner an opportunity to waive in writing conflict of interest that clearly exists. That these facts were not known to petitioner at the time of the hearing and petitioner just recently became aware of said facts.

III.

WHETHER PETITIONER IS DENIED DUE PROCESS BY REASON OF HER RIGHT TO VOTE TO CREATE COURTS, ELECT AND REMOVE JUDGES

The United States Constitution has guaranteed to the residents of the state the right to vote. Said right is secured to the registered residents of the states through the Fifteenth Amendment. The State Bar Association, which is a private party, created the State Bar Court, through its Board of Governors. That said State Bar Court is presided over by judges who

appointed by the State Supreme Court Justices. That petitioner as a registered voter and compelled member of the State Bar Association has been forced to forfeit her right to create the courts, elect and remove their judges. Thus, the State bargaining off one right in order to have another denies petitioner due process of law. State Bar Court are not subject to the authority of the Judicial Council, Judicial Committee, nor the Judicial Code of Conduct. That at the hearing the judge permitted the Trial Examiner to introduce graphic evidence of client's physical injuries sustained in the accident on March 13, 1982. [R.T. IV, p. 135:22-25, p.136:1-25, p.137:125, p. 138:5-25, p. 139:8-251. This item of evidence is extremely inflammatory and did not go to any issue presented by the Notice to Show Cause dated October 7, 1991, but was presented for the purpose of appealing to the sympathy, emotions, prejudices and biases of the judge. Had the judge been elected by the vote or by process of the executive branch of government, he would not have received said evidence. In addition, the recount of these statements of the accident of 1982 at the least appealed to the sympathy, prejudices

and passions of the trier of fact. It flies in the face of human reasoning that such an account of the accident, coupled with the financial interests, would not have any effect on the trier of fact in influencing his decision. The bell of sympathy and passion had been rung over petitioner's objections and could not be "unrung".

IV.

WHETHER PETITIONER HAS BEEN DENIED EQUAL PROTECTION OF THE LAWS.

The equal protection of the law means that equal protection and security shall be given under all under like circumstances in his life, his liberty, and his property, and in the pursuit of happiness, and in the exemption from any greater burdens and charges than are equally imposed upon all others under like circumstances. **Sovereign Camp W.O.W. v. Casodos**, D.C.N.M., 21 F. Supp. 989, 944.

> No person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty, and property, and in pursuit of happiness.

Connolly v. Union Sewer Pipe Co.184 U.S. 540, 46 L.Ed 679, 22 S.Ct. 431.

There is no equal protection of law in hearings which are conducted by financially interested judge. Because of the financial needs of the judge take precedent in determining the decisions, not the alleged misconduct, facts, evidence, nor the law. The state bar rules lack minimum due process of law and equal protection of law abrogating the fair trial constitutional requirements express in Sheppart v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507. Petitioner directs the Court's attention to the fact that the "Review Department" published a statement "Recommendation" in the Daily Journal (1/25/95), D.A.R.1058, setting forth its "alleged findings". That the publication was inflammatory in that it stated that petitioner had violated Rule 5-101, Section 6106, and 8-101 and stated of alleged facts supporting its conclusion. Such publication its conclusion. Such publication was made "under color of the State Bar Court".

In the case entitled McCartley v. Commission on Judicial Qualification (1974)116 Cal.Rptr.260, 526 P2d 268, 12 C3d 512, the judge who was investigated by the Commission to determine his fitness to sit, was found to be undesirable to continue sitting

by the Commission. However, these findings could be published without the written consent of the judge being investigated. Petitioner was not given an opportunity to consent to said publication. Additionally, other professions are afforded protections which are not subjected to attorneys.

V.

WHETHER PETITIONER IS IN VIOLATION FORMER RULE 8-101(B)4.

This requires an attorney to promptly pay over to or deliver to the client, upon the client's demand, property in the attorney's possession to which the client was entitled. This rule by its language and intent characterizes funds after the funds are deposited in a trust or client's funds account. It is extremely crucial to bear in mind that at the time the subject funds were deposited in the personal account of petitioner, the funds had acquired a different character. The only evidence in the record to refute the character of the funds at the time deposited is Sandra Brown's testimony, "Okay. Did your mother ever tell you that Lillian gave her $750 in cash sometime in 1986?" [R.T., Vol. IV,

150:3-4). Petitioner testified, "So you paid her [Client] $700 before . . . ? That's correct." [R.T., Vol. II, 16:7-81. All reasonable doubts affecting an item of evidence should be resolved in favor of the accused.

VI.

WHETHER THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT THE DECISION/RECOMMENDATION HEREIN.

It is well-settled by statute and case law that a decision/judgment must be supported by some legal evidence tending to prove every material fact in issue as to which the party in whose favor the decision/judgment was rendered had the burden of proof.

As in the case at bar the Trial Examiner had the burden of proof by "clear and convincing" evidence on all elements of misappropriation that the sum of approximately $20,000 had been misappropriated. Through witness Sandra Brown, the Trial Examiner attempted to demonstrate to the Court that [Client] was probably intoxicated on September 19, 1986, the day [Client)

came to petitioner's office and signed Agreement dated September 19, 1986. [Exhibit B]. [R.T., Vol. II, 152:525,153:9-181. Witness Lucerne Middlebrook testified, "Okay. From the period 1985 through the time that Margie Brown died, how often would you see Ms. Brown? Let's say, how many times a month would you see Ms. Brown? I saw her every day. [R.T., Vol. V, 16:12-181. Trial Examiner did not present any medical reports nor psychiatric reports of the "alleged alcoholism" that the [Client] may have been suffering from. There is no testimony offered that [Client] was intoxicated on the date of September 19, 1986.

Additionally, petitioner invites the Court's attention to the case entitled Keithley v Civil Service Bd. (1970), 11 C.A.3d 443, 89 Cal.Rptr. 809. The facts involved a police officer who had worked on a day shift which terminated at 3:30 p.m. The officer was called to the patrol division desk at 6:00 p.m. Once there the officer was kept waiting until 11:00 p.m. when he was told to report to homicide division where he was informed that he had been charged with a serious crime. After being advised of his

rights, he was interrogated and during the interrogation he was told that he had been charged with the crime of rape of a woman who was staying with him and his wife. The interrogation concluded at 2:00 a.m. and he was told to return the next day at 8:00 a.m. The police officer feared that his wife would leave him if the matter was published so [he] resigned. There is no evidence that petitioner engaged in any conduct that comes close [to] the facts of the above-cited case in an attempt to obtain a loan from [Client].

VII.

ARGUENDO, IF THE RECOMMENDATION CAN BE SUPPORTED BY THE EVIDENCE, THE RECOMMENDED DISCIPLINE IS EXCESSIVE AND ERRONEOUS.

Assuming for the sake argument, that the decision is supported by creditable, reasonable, and evidence of a solid value, the petitioner takes the position that the recommendation is extremely has and excessive in the instant case. Petitioner respectfully directs the court's attention to the case entitled

Clarence E. Blair v. The State Bar of California (1980), 27 C.3d 407, 612 P.2d 924. In 1974, petitioner was retained by Michael Hayes to litigate a personal injury claim. The case was settled for $9,250 and on January 9, 1976, petitioner received and deposited the settlement funds in his client's trust account. On January 15, 1976, petitioner paid to Hayes $3,389.97 from the settlement funds and agreed to pay from the remainder of the funds various obligations (medical expenses and legal fees owing to another attorney).

In addition the evidence showed that during the period from January 15, 1976, to October 13, 1977, petitioner's trust account had dropped below the amount entrusted to petitioner by Hayes. Client's trust account was used for other than payment to petitioner for earned attorney's fees and costs. The board found that petitioner wilfully misappropriated funds and commingled funds.

Petitioner's prior disciplinary record revealed that petitioner in May,1975, petitioner settled a matter for his clients, Ms. and Mrs.John Hall, petitioner paid a portion of the settlement

to the Halls and acting with the Halls' consent, retained the balance to pay certain medical bills. However, the medical bills were not paid until after the Halls complained to the State Bar. The board found petitioner had failed to pay these bills until August, following the State Bar inquiry regarding the Halls' complaint. In addition, the board found that petitioner had negligently commingled the Halls' funds with other clients' funds and also negligently misappropriated the Halls' funds by allowing his trust account balance to fall below the amount held on behalf of the Halls.

The court held that the board's recommendation was appropriate. It ordered the petitioner be suspended from the practice of law for two years on conditions of probation, including an actual suspension of six (6) months and other standard conditions.

A comparison the facts in the above-cited case, they are similar in that the [Client] in the instant case before the Court received a portion of the settlement funds, to wit, on September 19, 1986, she was cashed out in the sum of approximately $800

and during the years from 1987 to mid-1988, paid approximately $1,000. The instant case involved a settlement from a personal injury matter.

The facts in the case at bar are dissimilar in that the [Client] was related to the petitioner. There existed between [Client] and petitioner a close relationship which was sustained in excess of thirty-eight (38) years. The facts in the cited case authority state that the petitioner therein had suffered a prior disciplinary proceeding for the same type of misconduct in May, 1975. The petitioner has practiced twenty (20) years and has not suffered a prior disciplinary proceeding. Although the charge of misappropriation of funds is a serious one, the rule and application of discipline recommended in the Blair case should be applied with a modification of six months suspension and an actual thirty-30 day suspension.

Further, the petitioner invites the Court's attention to the case entitled William Waysman v. State Bar of California (1986), 41 C.3d 452, 244 Cal.Rptr. 476,749 P.2d 331. This case involved

the following set of facts: petitioner was admitted to practice law in 1970. The petitioner practiced law for 12 years and in April, 1982, he formed a two-attorney partnership which was in existence for approximately three weeks. The petitioner's partner left the partnership, leaving the petitioner as sole attorney to handle 150 lawsuits that had been assigned the partnership by its client, the David Janison Carlyle Corporation and its subsidiaries and related companies. One of the cases involved the claim of subsidiary Environmental Investments against its insurance carrier. On or about May 27, 1982, insurance carrier issued a draft in the amount of $24,00, payable to "William H. Waysman, Attorney for E & I and Continental Associates, in full settlement of the claim." Petitioner instructed his secretary to inform the client that the settlement draft had been issued and [t]hat the secretary was to further secure the appropriate signature on the release. Petitioner several days later instructed the secretary to deposit the draft in his trust account. The draft was so deposited and the secretary notified petitioner that the draft would not be cleared for three weeks. The petitioner ordered the secretary to

retrieve the draft and redeposit it in his law office account where it would clear in seven days.

When petitioner returned, he found that the secretary had quit, having used a set of presigned checks from the office account to pay various expenses and salaries (including her own and that of her husband, a law clerk). Petitioner had incurred heavy expenses from the trial and had written other checks from the office account. Meanwhile, he had been in a series of complicated banking transactions which contributed considerable confusion as to the amount available in his office account. The entire $24,000 was spent. Petitioner retained a certified public accountant to assist him, but because he did not have funds to pay for this service, an audit was never completed. Petitioner advised Environmental Investments that its settlement funds had been spent. He began making restitution approximately five months later. In July, 1983, petitioner executed a promissory note to Environmental Investments in the amount of $24,000 at a rate of 10 percent, due December 31, 1984, subject to a six-month extension. At the time of the misappropriation, petitioner

was dependent on alcohol, apparently a result of a bitter divorce in 1979. He had for several years been under the counseling of a psychiatrist who now attributes the petitioner's poor judgment in handling his client's funds to his alcohol problem. Petitioner appears to have an extreme reaction to small amounts of alcohol which causes him to lose his sense of judgment and to become very confused.

In May, 1983, proceedings were commended against petitioner. Petitioner and State Bar examiner entered into a stipulation of facts and an agreed upon discipline, to wit, petitioner be suspended from the practice of law for one year, that execution of the suspension be stayed, and that petitioner be placed on probation for one full year subject to specific condition, including that he make restitution of $24,000 at 10 percent per annum.

In April, 1984, the Review Department of the State Bar Court rejected the stipulation on the ground that the discipline "appears excessive in view of the stipulated facts, and that it "fails to set forth the time within which [petitioner] must make restitu-

tion.

In August, 1984, the parties entered into a second stipulation which the Review Department subsequently approved. This time, the discipline included suspension from practice for six months, a stay of suspension, and probation for one year on specific conditions. The conditions during the probationary period included that petitioner make full restitution by December 1984, (subject to a six-month extension) at the rate of 10 percent per annum; that the petitioner be assigned a probation monitor referee; that he abstain from the use of intoxicants; that he remain enrolled in Alcoholics Anonymous and be an active member of the State Bar (or other) rehabilitation program for alcohol abuse. The court imposed the recommendation of the Review Department as its decision.

The facts of the case at bar similar in that the petitioner was in an "association" with another attorney for a period of time. However, during the years 1987 the "association" was very stressful, in that, there were disputes over client referrals. Also, petitioner's clientele in 1988 and shortly thereafter became non-

existent. That the loss of clientele forced petitioner to close her office. The amount involved in the present is less than the amount in the cited case. In the Waysman case the draft was deposited in the personal "law office account" of the petitioner and the only explanation was that the "clearing period" would be one week, as opposed to three weeks. In the present case, the settlement check was wired directly to petitioner's personal account because petitioner had cashed out [Client] approximately two weeks before the transmission of the check. Additionally, petitioner believed based upon Exhibits A and B and conversations had with the [Client] during the week of September 15 through 19, 1986, the funds had changed character and had become the personal property of petitioner. That the promissory note was unsecured as the promissory note in the Waysman case. Petitioner feels that the present case at bar warrants the same degree of discipline as granted in the Waysman case with exception that actual thirty-30 day suspension. [See petitioner's Exhibit A.]

///

FACTORS IN MITIGATION

Petitioner respectfully moves the Court to consider the fact that the [Client] filed a written complaint with the State Bar in June, 1990. That Notice to Show Cause was filed by the office of Trial Counsel on October 7, 1991. The OTC was advised there was in existence a "Note Straight" which had been given to [Client] in October, 1990. However, no effort was made by the OTC to take the deposition of [Client] nor is petitioner aware of any statements [Client] made regarding said note. Petitioner was deprived of an opportunity to review this evidence which may have led to identity of other possible witnesses as to the whereabouts of the original of the note. The [Client] did not die until January 8, 1992.

Petitioner has worked as a volunteer attorney assisting low-income "pro per" clients in the area of filing domestic violation proceedings, simple divorces, guardianships, adoptions,and restraining orders. Petitioner commenced working for the Harriett Buhai Family Law Center in December 27, 1984, and has continued until April, 1994. [Exhibit next in order].

Petitioner has been licensed to practice law for approximately twenty (20) years and no prior disciplinary proceedings have been filed against her.

VIII.

CONCLUSION

Based upon the foregoing, the record does not contain the state of evidence by a clear and convincing standard as to all material facts to support the charges so alleged. Therefore, the State Bar Court has failed to meet its burden of proof. Petitioner respectfully requests that the [matter] be remanded to the Hearing Department for a hearing de novo as to all charges before this Court.

Dated: June 23, 1995. Respectfully Submitted,

LILLIAN B. JOHNSON
In Propria Persona

VERIFICATION

I, LILLIAN B. JOHNSON, am the petitioner in the within proceedings and I have read the foregoing and know its

contents. The matters stated therein are true of my own knowledge, except as to those matters stated on information and belief, and as such matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on the 23rd day of June, 1995, at Los Angeles, California.

LILLIAN B. JOHNSON
Declarant

THE SUPREME COURT OF THE STATE OF

CALIFORNIA

IN RE LILLIAN BROWN JOHNSON, NO. S046247

Petitioner, (St. Bar Ct. No. 86-0-12794)

vs.

THE STATE BAR COURT OF THE STATE BAR OF CALIPORNIA, JUL 24, 1995

Respondent.

PETITION FOR DISQUALIFICATION AND REMOVAL OF JUSTICES AND APPOINT DISINTERESTED COURT OF APPEALS JUSTICES TO HEAR AND MOTION TO DECLARE STATE BAR COURT STATUTES, RULES, REGULATIONS AND STANDARDS UNCONSTITUTIONAL

LILLIAN B. JOHNSON
P. 0. Box 19-1191
Los Angeles, California
90019
(310) 826-2180

In Propria Persona

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE LILLIAN BROWN JOHNSON, 46247 *NO- SO*

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THE STATE BAR COURT OF THE STATE BAR OF CALIFORNIA,

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PETITION FOR DISQUALIFICATION AND REMOVAL OF JUSTICES AND APPOINT DISINTERESTED COURT OF APPEALS JUSTICES TO HEAR MOTION TO DECLARE STATE BAR COURT STATUTES, RULES, REGULATIONS AND STANDARDS UNCONSTITUTIONAL

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to California Code of Civil Procedure, Section

170.1 et. seq , petitioner, LILLIAN B. JOHNSON, respectfully moves this Court for a recusal order in the pending matter before this Court. That petitioner cannot secure a fair and impartial hearing in the Petition for Review of Decision filed herein.

ISSUES

The accused attorney cannot secure a fair and impartial hearing because the Court is biased and/or prejudiced against a nonparty witness during the evidentiary phase of the proceedings.

The hearing Judge, trial examiner, nor the investigators disclose their financial interests in the outcome of the proceedings.

ARGUMENT

I.

WHETHER SUPREME COURT APPOINTED HEARING JUDGE IS BIAS AGAINST A NONPARTY WITNESS FOR PETITIONER WHICH MAKES IT IMPOSSIBLE FOR PETITIONER TO SECURE A FAIR AND IMPARTIAL HEARING BEFORE THIS COURT.

Bias. inclination; bent; prepossession; a preconceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. To incline one side. Condition of mine, which sways judgment and renders judge unable to exercise his functions impartially in particular case. As used in law regarding disqualification of judge, refers to mental attitude or disposition of the judge toward a party to the litigation, and not to any views that he may entertain regarding the subject matter involved. [See state ex rel. Mitchell v. Base Stores Co., 157 Kan. 622, 143 P.2d 652, 655.1Black's Law Dictionary, Sixth Edition, P. 162.

During the evidentiary phase of the proceedings at the State Bar Court, the Judge "cross-exainilqied a nonparty witnessf Mrs. Ionia Alexander as follows:

THE COURT: A lot of people see people writing names. Just seeing it isn't enough. What other, if any -- is there anything else that you can tell this court that would cause this Court to believe what you're saying?

MS. JOHNSON; Your Honor, I'm going to object to the line of questioning, Ycu're calling for the witness to speculate as to what the Court is to believe or disbelieve.

THE COURT: Overruled. Do you understand the question.

Reporter Transcript, VI, I,.,age VI-98,11. 9-18

Petitioner recalls that as the judge was cross-examining this nonparty witness, he at t.he beginning of the passage "[I]f any -- is there anything else that you can tell this Court that would cause this Court to believe what you're saying?," jumped up from his seat and walked within a few feet of the witness' desk. Petitioner contends that not only was this intimidating, but was flagrant

display of bias on the part of the hearing judge. Petitioner further observed that the hearing judge did not demonstrate this kind of behavior when questioning any of the witnesses calling by the "trial examiner."

II.

WHETHER THE PECUNIARY INTERESTS OF THE HEARING JUDGE, TRIAL EXAMINER, AND INVESTIGATOR IN THE OUTCOME OF THE PROCEEDINGS PREVENTED PETTTIONER FROM SECURING A FAIR AND IMPARTIAL HEARING

Petitioner directs the Court attention to the case entitled Plangas v. State Bar of Nevada (1981), 655 F.2d 946. That case involved a recommendation by the Nevada State Bar Board of Governor that attorneys Ross and Flangas be fined $30,000 each and suspended from the practice of law for two years for allegedly charging excessive fees in connection with a probate matter. Among other occurrences in this matter, Flangas filed a motion for a new trial and motin to file an amended complaint with the district court. He sought to add a new count to the

original complaint, charging that two of the three non-recused members of the Nevada Supreme Court were prejudice and bias towards him concerning the disciplinary proceedings. The district court granted Flangas's motion for preliminary injunction and leave to amend his complaint. The court went to opine that the Nevada Supreme Court was still biased-in-fact, despite the recusal of the two justices. The district court relied upon the holding in Gibson v. Berryhill (1978), 411 U. S. 564, 93 S.Ct. 1689, 36 L.Ed2d 488 that a state administrative body is incompetent to adjudicate a matter by virtue of pervasive bias...

Petitioner relies on the holding on the above cited case and that the State Bar Court is the alter ego of the California State Supreme Court and as such, the Supreme Court is the trier of fact and the appellate court which the California Constitution does prohibit.

CONCLUSION

Based upon the foregoing, petitioner respectfully move this Court for its recusal order.

Dated; July 22, 1995

LILLIAN B. JOHNSON
IN PROPRIA PERSONA

VERIFICATION

I, LILLIAN B. JOHNSON, am the petitioner in the within proceedings and I have read the foregoing and know its contents. The matters stated therein are true of my own knowledge, except as to those matters stated on information and belief, and as to such matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on the 22nd day of July, 1995, at Los Angeles, California.

LILLIAN B. JOHNSON
Declarant

ATTORNEYS

Counsel's Overreaching At Expense of Sister-in-law With Poor Health and Low Income Justifies Suspension

Cite as 95 Daily Journal D.A.R. 1058

In the Matter of

LILLIAN BROWN JOHNSON

A Member of the State Bar

No. 86-0-12794

Review Department of the State Bar Court

Filed January 23, 1995

This case involves an attorney who exploited a vulnerable, impecunious relative by improperly borrowing and not repaying the bulk of the proceeds of a personal injury settlement obtained by the attorney-on her behalf. Respondent Lillian Brown Johnson

has requested review of the decision of the hearing department, which recommended a five-year stayed suspension, a five-year probation term on conditions including $22,910 in restitution within two years, and actual suspension for two years and until she demonstrates her rehabilitation and fitness to practice. While we modify a few of the findings of the hearing judge, we agree that two years of actual suspension and restitution constitute fitting discipline for respondent's overreaching at the expense of her sister-in-law, now deceased, [1] a woman of limited income, in poor health, who lacked sophistication in business matters.

FACTUAL FINDINGS

A. Facts as Found and Supported by the Record

Margie L. Brown, sister-in-law of respondent, was seriously injured on March 13, 1982, when a hair spray product she used ignited while she was cooking, severely burning her. Ms. Brown's injuries required her hospitalization and prevented her from working as a part-time cleaning woman for

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1 The client, Margie L. Brown, died in January 1992, after the notice to show cause was filed.

approximately one month.

Mrs. Brown retained respondent to file suit and seek other remedies on her behalf against World of Kurls, the manufacturer of the hair care product. Respondent maintained at the hearing that she had a written retainer agreement with Ms. Brown which provided for a contingent fee of 40 percent of any recovery in payment for respondent's fees if the case settled after a complaint was filed. Respondent was unable to produce a copy of this retainer agreement assertedly because of the loss of her files. (See fn. 2, post.) The hearing judge found that the contingent fee agreement was an oral one.

Respondent filed a lawsuit on Ms. Brown's behalf in the Superior Court of Los Angeles County on March 14, 1983. After answers were filed, the parties entered into settlement negotiations and in September 1986, respondent and counsel for the defendants agreed to settle Ms. Brown's case for $40,000.

The insurance company dispensing the settlement funds received a copy of a standard release form with the signature of Ms. Brown, witnessed by Earl Johnson, respondent's son. In

turn, the insurance company agreed to the unusual arrangement of electronically transferring the settlement funds directly to an account maintained by respondent. That account, noted in the insurance company records as a trust account, was in fact a personal account maintained by respondent. On or about October 14, 1986, the insurance company transferred funds to respondent's personal bank account. The designated payees on this transfer were respondent and Ms. Brown. The lawsuit was dismissed on respondent's motion on October 27, 1986.

Under the oral retainer agreement, Ms. Brown would have been entitled to receive $24,000, less $200 in estimated court costs. Respondent admitted that none of the proceeds of the settlement went to Ms. Brown. According to respondent, Ms. Brown agreed to loan her without security $19,860 from the settlement proceeds, which respondent later used as a down payment on the purchase of a residence. In addition, Ms. Brown agreed to pay $3,250 for legal services provided by respondent in two prior legal matters; $140 represented cash respondent had allegedly advanced Ms. Brown prior to the settlement, and the

remaining $750 was allegedly given to Ms. Brown in cash at the time the insurance release was executed.

In support of this accounting, respondent produced a copy of a promissory note dated September 26, 1986, executed by respondent in Ms. Brown's favor for $19,860 with 10 percent interest from January 2, 1987, payable on or before January 3, 1991. In addition, respondent produced a copy of an agreement dated September 19, 1986, signed by both respondent and Ms. Brown, in which Brown agreed to loan respondent approximately $20,000 at 10 percent interest for the purchase of real property. She agreed to pay legal fees for a prior criminal case of $2,500, and an additional $750 in fees for a damage claim filed against Ms. Brown[2], out of the World of Kurls settlement.

Respondent testified that she negotiated for the loan with

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Respondent produced 1984 correspondence with the Allstate Insurance Company to corroborate her work on the damage claim. Respondent had no documents regarding the alleged 1980 criminal matter in Compton Municipal Court. Respondent explained that when her law practice disintegrated in 1988, between 400 and 500 of her files were placed in storage and were sold when she could not make the storage payments. She submitted a certification from the Municipal Court, Compton Judicial District, which stated that the court was not in possession of documents related to the case name and docket number provided by respondent and set forth the document destruction schedule for the court.

Ms. Brown from September 15 until the agreement was signed on September 19. Later in the hearing, she claimed that she had advised Ms. Brown that she could speak to another attorney concerning the loan transaction but did not have a written acknowledgment of this advice. Respondent testified that Ms. Brown was not interested in speaking to another attorney, was unconcerned that the loan was not secured, and was satisfied with a lump sum repayment of the loan without receiving periodic payments of principal or interest. Respondent admitted that she did not offer Ms. Brown a partial ownership interest or security interest in the real estate to be purchased with the loan proceeds. Respondent claimed Ms. Brown was willing to make the loan to respondent because Ms. Brown said she did not need the settlement proceeds immediately. Respondent also testified that she had $100,000 in accounts receivable from client fees which could have secured her loan repayment.

After presenting extensive evidence contesting the authenticity of the signatures on the loan agreement, the Office of the Chief Trial Counsel ("OCTC") withdrew from its position

that the signatures on the loan agreement and the release were not executed by the same person. After evaluating the evidence, the hearing judge concluded that OCTC failed to prove by clear and convincing evidence that the signatures of Brown on the release and on the agreement to loan respondent money were forgeries. The hearing judge also ruled that respondent had not established by a preponderance of evidence or otherwise that Ms. Brown had signed the release and the loan agreement. However, the hearing judge resolved the doubt about the validity of the documents in respondent's favor. (Karelus v. State Bar (1987) 44 Cal.3d 179, 183; Ballard v. State Bar (1983) 35 Cal.3d 274, 291.) Upon our own independent review, we conclude that the evidence submitted does not undermine the authenticity of the loan agreement and therefore find a loan was made from Ms. Brown to respondent.

As to the cash payments made to Ms. Brown, respondent could not produce cash receipts or other evidence of these payments. She contended that the $140 payment was made in early September during the week that she was negotiating for the

loan with Ms. Brown. The remaining $750 or so was her "cash out" of Ms. Brown at the time the release was signed, paid in cash from her office drawer.

The hearing judge concluded that these cash payments were never made. In support of this conclusion, the hearing judge outlined what he characterized as the "many suspicious and unexplained circumstances relating to Respondent's dealings with Brown." (Decision at p. 18.) He recounted respondent's varying versions of the time, place and amount of the cash payments. He noted that respondent claimed that she had made these cash distributions just prior to and after the settlement negotiations concluded, and that they were in amounts which served to exculpate respondent from charges that she misappropriated or mishandled entrusted funds. The cash distributions were not mentioned in the loan agreement or promissory note, nor were they corroborated by any other evidence. Finally, even if respondent's assertion that she advanced $140 to Ms. Brown at the time she executed the promissory note is accepted as true, Ms. Brown's alleged plea for cash contradicts respondent's claim

that Ms. Brown did not need the settlement funds immediately. We agree that respondent did not establish that she advanced any monies to Ms. Brown before the settlement proceeds were wired.

Respondent was unable to repay the loan in full to Ms. Brown when it came due. She claimed she gave Ms. Brown between $800 and $1,000 in cash before her law firm disintegrated in 1988. These payments were allegedly made during lunchtime visits with Ms. Brown after respondent had made morning court appearances. Respondent could not produce any receipts. The hearing judge concluded that the evidence was insufficient to show that respondent repaid any funds to Ms. Brown. We agree.

Respondent also failed to make her mortgage payments on the house purchased with the funds provided by Ms. Brown and the house was lost to foreclosure in 1989. After Ms. Brown died, respondent made no effort to locate the heirs or make any payments on the loan.

The hearing judge concluded that respondent had violated

Business and Professions Code section 6106 [3] by misappropriating the entire settlement under egregious circumstances and misrepresenting to the insurance company that it was to wire funds to her trust account when it was in fact her personal account. He determined that she had violated former rule 8-101[4] in having the settlement funds wired to her personal account. He also found that she had entered into a business transaction with a client without complying with the requirements of former rule 5-101. Finding that respondent lacked candor toward the court, was indifferent to rectifying the harm caused by her misconduct, caused significant harm to her client and had little mitigating evidence beyond the lack of a prior record, the hearing judge recommended a five-year stayed suspension, a five-year probation term, and actual suspension for two years and until respondent demonstrated her rehabilitation at a hearing

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3 Except as noted, all further references to sections are to the Business and Professions Code.

4 All references in this opinion to rules are to the former Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989.

pursuant to standard 1.4(c)(ii),

Standards for Attorney Sanctions for Professional Misconduct. (Trans. Rules Proc. of State Bar, div. V ("stds.").) He also recommended that respondent be required as a probation condition to make restitution of $22,910 plus interest to Ms. Brown's estate or heirs within two years.

B. Modifications to Factual Findings

We have two modifications to the facts as found by the hearing judge. Respondent testified that when she negotiated for a wire transfer of the settlement funds, she did not represent to the insurance company that the funds would be wired to a trust account. While the hearing judge did not find respondent credible in most respects, the only evidence to rebut her testimony was a notation in the insurance company records that the account was a trust account. Disbelieving respondent does not create evidence to the contrary. (In the Matter of DeMassa (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 749.) The notation may reflect the insurance company employee's own assumption about the nature of the account, since in the normal course of

business, such a transaction would involve a trust, rather than a personal account. However it alone does not establish that it resulted from a misrepresentation by respondent to the company. Therefore we modify the factual findings and conclusions to conclude that there is no clear and convincing evidence that respondent misled the insurance company about the nature of the bank account.

As to the attorney's fees authorized under the agreement for prior legal work, the hearing judge concluded that the $2,500 set off for attorney's fees allegedly performed for a criminal case in 1980 was improper because respondent did not prove that the criminal case ever existed. The hearing judge did not consider respondent's evidence sufficient to establish that the criminal case ever existed. The State Bar investigator who did a criminal records search in the Municipal Court in Compton failed to uncover any criminal court file relating to Ms. Brown.

Considering the age of the criminal case (1980), it is not surprising that the State Bar was unable to locate a record concerning the criminal matter when it sent its investigator to the

Compton Municipal Court. However, the testimony of an investigator is far from the best evidence on the contents of court records. Testimony or sworn evidence from the court clerk responsible for the records is more germane and reliable on this issue. Here, the court clerk's certification of document destruction (see fn. 2, ante) casts doubt that the municipal court had retained any case files more than 10 years old.

Nevertheless, Ms. Brown agreed in the loan agreement to pay for legal fees for prior cases out of the settlement funds. The lack of corroborative evidence as to the criminal case is therefore immaterial. Respondent was entitled under the agreement to take her attorney's fees for these prior cases and we so find.

DISCUSSION

A. Due Process claims

As a preliminary matter, respondent argues the decision violates due process on two grounds. First, respondent contends that testimony by Ms. Brown's daughter, Sandra Brown, describing her mother's injuries from the accident which sparked the lawsuit against World of Kurls, prejudiced the

hearing judge. Respondent argues that the testimony was introduced to inflame the emotions of the hearing judge and it improperly influenced his ultimate decision.

In response, OCTC cites to our analysis in In the Matter of Hertz (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 469. Hearing judges are accorded wide latitude to receive all relevant evidence and actual prejudice must be established before a party is entitled to relief. OCTC argues that respondent has not demonstrated any prejudice resulting from the testimony.

From an independent review of the record, we do not find that the hearing judge was prejudiced by Sandra Brown's testimony concerning her mother's injuries.

In addition, respondent claims she was denied due process because she was not permitted to recall and examine OCTC witnesses Lucerne Middlebrook and Carolyn Porter. At the completion of Ms. Porter's testimony on April 29, 1993, respondent asked the hearing judge to place Ms. Porter on call and the hearing judge so ordered. A similar request was made to the judge after the close of Mr. Middlebrook's testimony but that

request was denied and the witness was excused. In both instances, the alternative of having respondent subpoena these witnesses was discussed. At a later point in the trial, respondent moved to have Ms. Porter and Mr. Middlebrook recalled to the stand. The hearing judge denied both motions; in the first instance, because Mr. Middlebrook had been excused, and regarding the second witness, because respondent had failed to subpoena Ms. Porter when respondent learned prior to that day's hearing that OCTC could not produce Ms. Porter.

OCTC argues that the hearing judge excused Mr. Middlebrook after his testimony and thus there is no procedural error. That is consistent with Evidence code section 778, which provides that, "After a witness has been excused from giving further testimony in the action, he cannot be recalled without leave of the court. Leave may be granted or withheld in the court's discretion."

However, Ms. Porter was placed "on call" and not excused from giving further testimony in the matter. Respondent's purpose for recalling Ms. Porter was to examine her

concerning a power of attorney allegedly executed by Ms. Brown in 1991, a document which respondent did not possess at the time Ms. Porter originally testified. The additional testimony was relevant only to authenticate the signature as Ms. Brown's and did not relate to the validity of the transactions at issue in the case. OCTC has abandoned its argument that the signatures on the documents in question were forgeries. Therefore, while respondent was entitled to have Ms. Porter recalled, there is no prejudice resulting from the judge's decision not to order the witness recalled.

B. Improper Business Transactions - Rule 5-101

Respondent challenges all the culpability findings, contending that they are not supported by sufficient credible evidence. She does not address specifically the facts underlying the violation of former rule 5-101.

The rule required that the terms and conditions of the loan had to be fair and reasonable to Ms. Brown, that they be explained in terms that she understood, that she be advised by respondent to seek the advice of independent counsel concerning

the terms of the loan, and that Ms. Brown consent to the transaction in writing. A loan from a client to an attorney, like any attorney-client business transaction, is "scrutinized with the utmost strictness for any unfairness." (Rodgers v. State Bar (1989) 48 Cal.3d 300, 314, citing Beery v. State Bar (1987) 43 Cal.3d 802, 812-813.) The burden is on the attorney to demonstrate that the dealings with the client were fair and reasonable. (Hunniecutt v. State Bar (1988) 44 Cal.3d 362, 372-373; In the Matter of Lane (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 745.) A violation of any portion of rule 5-101 is sufficient to constitute misconduct. (Read v. State Bar (1991) 53 Cal.3d 394, 411.)

The terms and conditions of the loan were clearly unfair. This is a situation when security would ordinarily be considered essential to the client and thus an unsecured loan under these circumstances is an indication of unfairness. (Hunniecutt v. State Bar, supra, 44 Cal.3d at p. 373; In the Matter of Hagen (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 164.) The loan did not provide for any payments other than a lump sum payment in

January 1991, which was again unreasonable, considering the financial circumstances of the client. (See, e.g., Rose v. State Bar (1989) 49 Cal.3d 646, 662.) Nor did respondent describe such possible terms as the assignment of a security interest or other lien against the real property which respondent acquired with the loan proceeds, as options that could have safeguarded Ms. Brown's interests.

We agree with the hearing judge's conclusion that Ms. Brown's written consent to the transaction was not a knowing one because Ms. Brown was incapable of giving informed consent and her incapacity was known to respondent. Respondent was obligated to insure that the terms and conditions of the loan were fully known and understood by Ms. Brown. (Hunniecutt v. State Bar, supra, 44 Cal.3d at pp. 372-373, citing Clancy v. State Bar (1969) 71 Cal.2d 140,. 146-147.) Ms. Brown's poor health, frequent use of alcohol, lack of sophistication in business matters, and limited education were all evident to respondent (her sister-in-law) and undermined respondent's claim that she had obtained Ms. Brown's informed

consent to the loan. The hearing judge also disbelieved respondent when she claimed to have advised Ms. Brown to seek independent counsel. Respondent was obligated to go beyond informing Ms. Brown that she had a right to consult another attorney and was required to advise her to do so. (Rose v. State Bar, supra, 49 Cal.3d at p. 663.) Respondent was clearly overreaching.

We will also consider the conditions under which respondent secured the loan from Ms. Brown as grounds for discipline as an act of moral turpitude under section 6106.

C. Section 6106 - Moral Turpitude

The hearing judge found that respondent violated section 6106 in five respects: (1) she misrepresented to the insurance company that the bank account for the wire transfer was a trust account; (2) she charged her client for legal fees in a criminal case which did not exist; (3) she misappropriated the proceeds of a loan to which she was not entitled; (4) she misappropriated the balance of settlement funds that she claimed to have paid out in cash to her client; and (5) she obtained the loan in a manner "so

egregious and so abusive of her obviously vulnerable client as to constitute moral turpitude." (Decision at p. 16.) Respondent contests all five findings by the hearing judge. We have rejected the first two bases of culpability by our modifications to the judge's factual findings. After reviewing the Supreme Court's opinions in this area, we also reject the finding that respondent misappropriated the loan proceeds. We do find ample evidence for concluding that respondent's procurement of the loan and retention of the balance of the settlement funds constituted acts of moral turpitude and dishonesty.

Both the hearing judge and OCTC conclude that the finding of improprieties committed by respondent in securing this loan means that respondent must have misappropriated the loan proceeds. There is no case law that an improper transaction under former rule 5-101 automatically converts the attorney's acquisition of the funds as part of the transaction into a misappropriation. OCTC compares it to the retention of client property under circumstances that were neither reasonable nor honest, citing In the Matter of Harris (Review Dept. 1992) 2 Cal.

State Bar Ct. Rptr. 219, 229-230. In Harris, the attorney borrowed computer equipment from the client and refused to return it upon the client's request, claiming it to be a part of her attorney's fees. She was found to have converted the equipment, in violation of section 6106. Here, respondent had a claim of right to the bulk of the funds under the loan agreement signed by the client. The fact that the negotiation and final terms of the loan breached respondent's duties did not invalidate the underlying transaction. We find that respondent's failure to repay the loan does not constitute theft; rather, her default aggravated the harm already suffered by respondent's client.

Indeed, there are a number of cases in which an attorney violated rule 5-101 by improperly soliciting a loan or investment from a vulnerable client on the heels of the client's receipt of a large settlement where misappropriation was not found. (See Rose v. State Bar, supra, 49 Cal.3d at p. 663; Hunniecutt v. State Bar, supra, 44 Cal.3d at pp. 372-373, Beery v. State Bar, supra, 43 Cal.3d at pp. 811-812.) In all three cases, restitution was ordered to ameliorate the harm caused by the misconduct.

In Rose, the attorney persuaded a young widow with two young children to invest $70,000 in a franchise restaurant equipment business in which the attorney was also a shareholder. The Court found that the attorney had failed to disclose the substantial risks of such an investment to the client, a person with virtually no business experience and limited financial resources apart from the settlement funds, and failed to advise her to seek independent counsel. Finding additional misconduct in four other client matters involving improper solicitation, incompetent practice, and trust fund violations, as well as evidence of mitigation, the Supreme Court ordered a two-year actual suspension.

In Hunniecutt, the attorney persuaded the client to loan the entire $5,000 settlement from a personal injury action to the attorney to invest in a real estate venture and later converted the transaction into an unsecured loan. The Court discussed the special trust this client placed in the attorney as a result of the personal injury litigation and concluded that because of the unfairness of the business transaction, violations of rule 5-101

and section 6106 had occurred. Considering mitigation evidence, including efforts to repay the client and to alter his practice to avoid a recurrence, the Court ordered a 90-day actual suspension.

In Beery, the attorney persuaded a client who had suffered an injury leaving him paralyzed below the waist, and who was unsophisticated in financial matters, to invest $35,000 of the proceeds of his personal injury settlement in a satellite venture. The attorney did not disclose either his relationship with the satellite company or its financial condition, did not advise the client to seek independent advice concerning the investment, and defaulted on his personal guarantee to repay the loan. The Court found that it was not an arms-length business deal, material facts were concealed, and the attorney had abused the trust reposed in him by the client. The Court ordered a two-year actual suspension.

However offensive respondent's actions were, they did not transform an improper business transaction into a misappropriation. We find that respondent did not steal the majority of the settlement proceeds, contrary to section 6106, but

obtained them pursuant to a loan transaction which otherwise violated respondent's duties to her client.

Nevertheless, the misconduct here violated section 6106 as an act of moral turpitude on other grounds. As noted by the Court in the Beery case, "The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party. (Beery v. State Bar, supra, 43 Cal.3d at p. 813, quoting Barbara A. v. John G.(1983) 145 Cal-App.3d 369, 383.) The fairness and reasonableness of a business transaction between an attorney and client go to the core of whether such overreaching constitutes moral turpitude. (Hunniecutt v. State Bar, supra, 44 Cal. 3d at p. 372.) As we stated earlier, the loan provisions were grossly unfair to Ms. Brown. As an attorney and a close family member, respondent exploited her superior knowledge and position of trust to the detriment of her vulnerable client and this clearly constituted an act of moral turpitude.

Respondent had no valid claim to the $700 which remained from the settlement, money which respondent claimed to have advanced to Ms. Brown out of her cash drawer. Respondent's misappropriation of those funds was an act of dishonesty and moral turpitude as well.

D. Commingling and Prompt Payment - Rule 8-101

Respondent contends that she did not violate former rule 8-101(A) in that all the funds had changed character from trust funds into personal funds prior to her receipt thereof. As a result of the respondent's agreement with Ms. Brown, all but approximately $700 was attributable to attorney's fees owed to respondent, costs owed to her or the loan. Nevertheless, since there was a mixed character to the funds, respondent was obligated to place the settlement proceeds into her trust account and thereafter dispense the $700 owed to her client promptly. There is no doubt that Ms. Brown made a demand for funds. Respondent's failure to place the settlement proceeds in a trust account and to pay the remainder promptly to Ms. Brown violated the trust account rules.

RECOMMENDED DISCIPLINE

A. Mitigation and Aggravation

Respondent argued in mitigation her long record of practice without prior discipline. (11 years prior to the misconduct in 1986), her close familial relationship with Ms. Brown, and the financial setbacks which she suffered as a result of the disintegration of her law firm in 1988. She has also moved to augment the record on review to include evidence concerning her pro bono activities,[5] and argues that the lack of any additional charges of misconduct filed against her from the time of this incident to the present should be given some mitigating weight. Respondent claimed that she had not located a file which contained the documentation regarding her pro bono work until she was preparing for review proceedings. Since respondent has

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5 Respondent originally submitted this evidence in her post-oral argument brief filed on July 29, 1994. OCTC moved by motion filed September 1, 1994, to strike the additional evidence sought to be admitted. Respondent filed an opposition to the motion to strike on September 12, 1994, as well as a separate motion to augment the record on review. OCTC opposed the augmentation request in papers filed on September 20, 1994. Respondent filed a supplemental declaration in support of her augmentation motion on September 29, 1994, and OCTC filed its response on September 30, 1994. The case was submitted on September 30, 1994.

not established good cause why the documentary evidence in her possession could not have been presented below, we decline to consider it. (See In the Matter of Frazier (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 686-687.)

Her years of practice without incident and the lack of any charges filed since this case are mitigating circumstances. Respondent's financial reversal could explain her inability to repay the loan or attempt any restitution to the heirs. However, since the reversal postdates the loan, it cannot be considered as mitigation of the misconduct itself. The fact that respondent's misconduct involved a family member does not constitute a mitigating circumstance. In Snyder v. State Bar (1990) 49 Cal.3d 1302, 1310, the attorney paid his own personal expenses, as well as those authorized by his client, a close personal friend, from the client's funds in trust, resulting in a misappropriation. The Court rejected the claim that the attorney's personal relationship with the client and the lack of any intent to harm the client were mitigating. Here, respondent's family ties to her client, her sister-in-law, made respondent all the more aware of the client's

vulnerabilities and the considerable trust the client placed in respondent. Rather than honoring that trust, respondent exploited it for her own benefit and to the harm and detriment of the client. The familial relationship here is not a mitigating circumstance; it is an aggravating one.

There is other aggravating evidence in this case. Respondent's misconduct involved multiple acts of wrongdoing, and significantly harmed her client. She showed indifference towards rectifying or atoning for her misconduct and had failed to make any attempt to repay the loan, or to contact the heirs. The hearing judge's decision is replete with examples of respondent's lack of candor at the hearing. The carelessness with which respondent lost control of between four and five hundred case files when her practice closed raises grave doubts about her ability to protect the interests of other clients as well.

B. Discipline Recommendation

We consider the cases involving improper business transactions with clients to be of greatest relevance in fashioning a discipline recommendation. After reviewing the parties' briefs

and the cases cited therein, the cases discussed in this opinion, the applicable standards,[6] and the aggravating and mitigating evidence, we adopt the substance of the hearing judge's recommendations for discipline, with two modifications of the probation conditions he proposed. We find that a five year stayed suspension, a five-year probation term including restitution within two years, and actual suspension for two years and until respondent demonstrates her rehabilitation and fitness to practice is consistent with prior attorney discipline cases of gross overreaching amounting to moral turpitude, which also contain substantial aggravating circumstances and little evidence in mitigation. (See Rodgers v. State Bar supra, 48 Cal.3d 300 [two-years actual suspension for improper loan in violation of rule 5-101 coupled with dishonesty and intentional concealment of the loans from the probate court and opposing counsel. Beery v.

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[6] Under standard 2.3, discipline for acts of moral turpitude includes actual suspension or disbarment, depending on the extent of the harm to the victim, the magnitude of the act, and its relationship to the practice of law. Misappropriation of small amounts of entrusted funds or other violations of trust account rules requires a minimum three-month actual suspension, under standard 2.2. The recommended sanction under standard 2.8 for an improper business transaction with a client is suspension, unless the misconduct and harm are minimal.

State Bar, supra, 43 Cal. 3d 802 (two year actual suspension for rule 5-101 and section 6106 violations, including concealing material facts from client regarding loan].)

The two modifications to the probation conditions are modifications of the restitution requirement. First, the restitution amount should be modified to require restitution of $20,550, plus 10 percent interest per annum from October 14, 1986, consistent with our finding that respondent was entitled to retain a portion of the settlement for prior legal services rendered. We also modify the terms of probation to recommend that respondent be ordered to remain on actual suspension for two years and until she provides proof of completed restitution to Ms. Brown's estate or heirs as prescribed by the hearing judge, as well as making the required showing pursuant to standard 1. 4 (c)(ii). We adopt the remainder of the hearing judge's discipline recommendation, as modified, including the requirements that respondent pass the California Professional Responsibility Examination prior to the expiration of her actual suspension, that she comply with the provisions of rule 955, California Rules of Court, and that she

pay costs as ordered by the Supreme Court.

PEARLMAN, P.J.

We Concur:

NORIAN, J.

STOVITZ, J.

OFFICE OF TRIAL COUNSEL
OFFICE OF TRIAL
THE STATE BAR OF CALIFORNIA
ROBERT P. HEFLIN
ROBERTA M. YANG
ALYSE LAZAR
RACHEL T. BIN, NO. 139780
333 South Beaudry Avenue, Ninth Floor
Los Angeles, California 90017-1466
Telephone: (213) 580-5000

THE STATE BAR COURT

OF THE STATE BAR OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of	Case No. 86-0-12794
LILLIAN BROWN JOHNSON	FIRST AMENDED NOTICE TO SHOW CAUSE

No. 64247

A Member of the State Bar

TO: LILLIAN BROWN JOHNSON, Respondent herein:

IF YOU FAIL TO FILE AN ANSWER TO THIS

NOTICE WITHIN THE TIME ALLOWED BY STATE BAR RULES, INCLUDING EXTENSIONS, YOU MAY BE ENROLLED AS AN INVOLUNTARY INACTIVE MEMBER OF THE STATE BAR AND WILL NOT BE PERMITTED TO PRACTICE LAW UNTIL AN ANSWER IS FILED.

You were admitted to the practice of law in the State of California on June 27, 1975. Pursuant to rule 501, Transitional Rules of Procedure of the State Bar of California, reasonable cause has been found to conduct a formal disciplinary hearing-commencing at a time and place to be fixed by the State Bar Court (NOTICE OF TIME AND PLACE OF HEARING WILL BE MAILED TO YOU BY THE STATE BAR COURT CLERK'S OFFICE), by reason of the following:

COUNT ONE

Case No-89-0-14511

1. On or about 1981, you were employed by Margie Brown (hereinafter "Brown") to represent her in a personal injury matter.

2. In or about October 1986, you settled your client's matter for Forty Thousand Dollars ($40,000.00). On or about October 14, 1986, the insurance carrier wired the Forty Thousand ($40,000.00) to your personal bank account. Thereafter, you misappropriated the settlement funds to your own use and purpose.

3. In or about November, 1988, one of Brown's medical providers, Dr. John Olson, contacted you concerning an outstanding medical lien. You misrepresented to Dr. Olsen's office manager that Brown's case was still pending. You failed to honor Dr. Olsen's medical lien. You failed to competently perform the services for which you were employed.

You committed the above-described acts in wilful violation of your oath and duties as an attorney under disciplinary case law and/or section 6106 of the California Business and Professions Code, and former rules 6-101(A) (2), 8-101(A) and 8-101(B)(I) of The Rules of Professional Conduct.

WITHIN TWENTY (20) DAYS after service of this Notice to Show Cause, you shall file a written answer as provided

in rule 522, Transitional Rules of Procedure of the State Bar of California.

NOTICE - DEFAULT PROCEDURE!

YOUR DEFAULT MAY BE ENTERED FOR FAILURE TO FILE A WRITTEN ANSWER TO THIS NOTICE WITHIN TWENTY (20) DAYS AFTER SERVICE AS PRESCRIBED BY RULE 552, TRANSITIONAL RULES OF PROCEDURE OF THE STATE BAR. SHOULD YOU TIMELY FILE AN ANSWER, YOUR DEFAULT MAY ALSO BE ENTERED FOR FAILURE TO APPEAR AT THE FORMAL HEARING. THE ENTRY OF YOUR DEFAULT MAY RESULT IN THE CHARGES SET FORTH IN THIS NOTICE TO SHOW CAUSE BEING ADMITTED AND DISCIPLINE RECOMMENDED OR IMPOSED BASED ON THOSE ADMITTED CHARGES. IF YOUR DEFAULT IS ENTERED, YOU WILL LOSE THE OPPORTUNITY TO PARTICIPATE FURTHER IN THESE PROCEEDINGS UNLESS AND UNTIL YOUR DEFAULT IS SET ASIDE ON MOTION TIMELY MADE UNDER THE PRESCRIBED GROUNDS. SEE RULE

552 ET. SEQ., TRANSITIONAL RULES OF PROCEDURE OF THE STATE BAR.

NOTICE-INACTIVE ENROLLMENT!

YOU ARE HEREBY FURTHER NOTIFIED THAT IF THE STATE BAR COURT FINDS, PURSUANT TO BUSINESS AND PROFESSIONS CODE SECTION 6007(c), THAT YOUR CONDUCT POSES A SUBSTANTIAL THREAT OF HARM TO THE INTERESTS OF YOUR CLIENTS OR TO THE PUBLIC, THAT YOU MAY BE INVOLUNTARILY ENROLLED AS AN INACTIVE MEMBER OF THE STATE BAR. YOUR INACTIVE ENROLLMENT WOULD BE IN ADDITION TO ANY DISCIPLINE RECOMMENDED BY THE COURT. SEE RULES 550 AND 560, TRANSITIONAL RULES OF PROCEDURE OF THE STATE BAR.

NOTICE-COST ASSESSMENT!

IN THE EVENT THESE PROCEDURES RESULT IN PUBLIC DISCIPLINE, YOU MAY BE SUBJECT TO THE PAYMENT OF COSTS INCURRED BY THE STATE BAR IN

THE INVESTIGATION, HEARING AND REVIEW OF THIS MATTER PURSUANT TO BUSINESS AND PROFESSIONS CODE SECTION 6086.10. SEE RULE 460 ET. SEQ., TRANSITIONAL RULES OF PROCEDURE OF THE STATE BAR.

OFFICE OF TRIAL COUNSEL

THE STATE BAR OF CALIFORNIA

Dated: November 2, 1992 BY:_____

RACHAEL M. BIN

Supreme Court, U.S.
FILED
OCT 6 1995
CLERK

(3)

No. 95-423

In The

Supreme Court of the United States

October Term, 1995

LILLIAN BROWN JOHNSON,
Petitioner,

vs.

THE STATE BAR OF CALIFORNIA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

DIANE C. YU, S.B. # 78676
LAWRENCE C. YEE, S.B. # 84208
RICHARD J. ZANASSI, S.B. # 105044*
555 Franklin Street
San Francisco, California 94102
(415) 561-8200

Attorneys for Respondent
* Counsel of Record

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QUESTIONS PRESENTED

1. Does the California Supreme Court's determination that recusal was not appropriate in light of petitioner's highly speculative and conclusory allegations of bias constitute a denial of due process or raise an important federal question which should be decided by this Court?

2. Whether petitioner's vague and unsupported claims of bias and financial interest on the part of the California Supreme Court and the State Bar of California raise an important federal question which should be decided by this Court?

3. Whether petitioner can challenge disciplinary rules and regulations on vagueness and due process grounds where (1) the language in the rules and regulations provides notice of the

proscribed conduct (2) petitioner was given formal notice of the proscribed conduct and the facts and circumstances alleged to have violated the rules and regulations in question prior to hearing (3) petitioner was afforded a full hearing at which time she was afforded an opportunity to address and refute the disciplinary charges and (4) petitioner made no objection on lack of notice/due process grounds until after the State Bar Court Review Department had recommended to the California Supreme Court that she be suspended from the practice of law.

4. Whether a federal constitutional question is raised by the action of the California Supreme Court in suspending petitioner from the practice of law because of conduct that involved the misappropriation of funds, the entering into a business transaction with a client

under terms and conditions that were neither fair nor reasonable, the failure to make any attempt to repay funds and the failure to rectify or atone for the misconduct, when petitioner was provided with an adversarial hearing before the Hearing Department of the State Bar Court, provided a second review hearing before the Review Department of the State Bar Court, and provided independent review by the California Supreme Court which ordered her suspended from the practice of law.

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No. 95-423

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

LILLIAN BROWN JOHNSON,
Petitioner,

vs.

THE STATE BAR OF CALIFORNIA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

I

STATEMENT OF THE CASE

By order filed August 10, 1995, Petitioner, Lillian B. Johnson, an attorney found culpable of having, inter alia, "exploited a vulnerable, impecunious relative by improperly borrowing and not repaying the bulk of proceeds of a

personal injury settlement[1]," was suspended from the practice of law in California by the California Supreme Court for a period of five years, execution of suspension stayed, on conditions that included a period of actual suspension for two years and until proof of restitution in the amount of $20,550 is provided and a requisite showing of fitness is made under standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Conduct.[2]

In her petition before this Court, Petitioner contends that the evidence does

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[1] A copy of the State Bar Court Review Department decision is included in Petitioner's Appendix to Petition for Writ of Certiorari ("Petition") at p. E1. The California Supreme Court issued its own order, incorporating the recommendation of the Review Department of the State Bar Court.

[2] A copy of the order is included in petitioner's Appendix at pp. A1-A2.

not support the findings or recommended discipline and that the recommended discipline is erroneous and excessive (Petition for Writ of Certiorari, hereinafter "Petition," pp. 25, 28-29, 30-33). Petitioner further contends that her due process rights were violated because of an alleged "financial interest" on the part of the California Supreme Court, the trial examiner and hearing judge and the perceived existence of an unconstitutionally created State Bar Court (Petition, pp. 13-22). Finally, Petitioner challenges the constitutionality of selected rules and statutes that govern attorney disciplinary matters (Petition, pp. 22-34).

For the reasons set forth herein, the State Bar respectfully submits that the petition is entirely without merit and should be denied.

II

BACKGROUND

A. The Nature of the State Bar of California.

The State Bar of California is a public corporation established in the judicial branch of government for the purpose of performing governmental functions in the administration of justice. Cal. Const. art. VI, § 9; Cal. Bus. & Prof. Code, § 6001.

Historically, the State Bar has statutory authority to prosecute attorney disciplinary proceedings, Cal. Bus. & Prof. Code, § 6094.5, and the State Bar Court has statutory authority to adjudicate such proceedings, Cal. Bus. & Prof. Code, §§ 6079.1(a), 6086.5, 6086.65(d). However, the California Supreme Court retains inherent power to control all matters related to attorney

discipline. Jacobs v. State Bar, 20 Cal. 3d 191, 196, 141 Cal. Rptr. 812, 570 P.2d 1230 (1977); Cal. Bus. & Prof. Code § 6087; Cal. R. Ct. 951(g). "Final authority for disbarment [and suspension] rests not with the bar but with the state Supreme Court." Rosenthal v. Justices of the Supreme Court of California, 910 F.2d 561, 566-67 (9th Cir. 1990).

The State Bar Court includes a Hearing Department, which conducts formal trial proceedings, and a Review Department, which functions as an appellate body in independently reviewing, upon either party's request, determinations of the Hearing Department on a de novo basis. Cal. Bus. & Prof. Code, §§ 6079.1(a) and 6086.65(d); Rules Proc. of State Bar, rules 2.17 and 2.27, West's Cal. R. Ct. - State (1991 Supp. Pamph.), pp. 579-580.

The State Bar Court, in its present form, was created by statute effective January 1, 1989, and began to hear and adjudicate attorney disciplinary proceedings on September 1, 1989. Cal. Stats. 1988, ch. 1159; Cal. Bus. & Prof. Code, §§ 6079.1(f) and 6086.65(b). The Hearing Department of the State Bar Court is comprised of six full-time hearing judges. Cal. Bus. & Prof. Code, § 6079.1(a). The Review Department is comprised of three members, including a presiding judge and a lay judge. Cal. Bus. & Prof. Code, § 6086.65(a).

In establishing the State Bar Court to replace the volunteer system that existed prior to 1989, the California Legislature modelled the State Bar Court after courts of record. However, the State Bar Court remains subject to the inherent authority of the California

Supreme Court to regulate attorney discipline. The California Supreme Court appoints the State Bar Court judges and delegates authority to the judges, subject to the Supreme Court's ultimate control. Cal. R. Ct. 951(g), 952; Cal. Bus. & Prof. Code §6087; Brotsky v. State Bar, 57 Cal. 2d 287, 301, 19 Cal. Rptr. 153, 368 P.2d 697 (1962).

While the grant of a writ of review of a State Bar disciplinary proceeding by the California Supreme Court is discretionary, Cal. R. Ct. 952, 954, all actions of the State Bar Court regarding attorney discipline are subject to the independent and plenary review of the California Supreme Court. Cal. Bus. & Prof. Code §§ 6082, 6083, 6087, 6100; Cal. R. Ct. 951(g). If no timely petition for review is filed, the recommendation of the State Bar Court for disbarment or

suspension is filed as an order of the Supreme Court. Cal. R. Ct. 953(b); see also Cal. Bus. & Prof. Code, § 6084. That is to say, the Supreme Court issues its own order, which is filed by the Clerk, incorporating the recommendations of the State Bar Court.

In petitions for writ of review of State Bar Court proceedings pursuant to rule 952 of the California Rules of Court, a conference memorandum is prepared with a recommendation on the petition by central staff of the California Supreme Court. The conference memorandum is distributed to the justices of the Court no later than Tuesday of the week before the assigned date for consideration of the petition by conference of the Court. Int. Op. Prac. & Proc. of the S.Ct. of Cal. IVB3, IVG1. The Court will order review when it appears (1) necessary to settle important

questions of law; (2) the State Bar Court has acted without jurisdiction; (3) petitioner did not receive a fair hearing; (4) the decision is not supported by the weight of the evidence; or (5) the recommended discipline is not appropriate in light of the record as a whole. Cal. R. Ct. 954.

B. Procedural History

On October 7, 1991, a three count notice to show cause was filed against Petitioner. The notice was answered by Petitioner on December 2, 1991.

On January 8, 1992, the State Bar filed a motion to dismiss the second and third causes of action. The motion was granted by the Hearing Department on January 14, 1992. Count One, which alleged that Petitioner misappropriated funds, failed to honor a medical lien and failed to perform competently, remained.

On September 23, 1992, the scheduled hearing was continued as the State Bar moved to amend the notice to add an additional charge of commingling. On October 28 and 29, 1992, the matter came on for hearing, at which time the State Bar was directed to file an amended Notice. On November 2, 1992, a first amended Notice to Show Cause was filed. The Notice was answered by Petitioner on November 13, 1992.

On November 20, 1992, following post-trial briefing, the matter was initially submitted for decision. However, on March 1, 1993, the Hearing Judge, on his own motion, reopened the hearing to allow the parties to present additional evidence on an allegation that Petitioner had violated former Rule 5-101 of the Rules of

Professional Conduct[3], which allegation had only become apparent during the course of the October 28th and 29th hearings. Further hearings were held on April 29, 1993, and on June 7, 8, 21, and 28, 1993.

On July 30, 1993, the Hearing Judge issued his decision, recommending that Petitioner be suspended from the practice of law for five years, stayed, on conditions that included a two year period of actual suspension and restitution of $22,910 within the two year period.

On August 30, 1993, Petitioner submitted an Application for Review by the Review Department. On September 13, 1993, the Review Department issued an Order to Show Cause Why Request for Review Should Not Be Dismissed, based on Petitioner's failure to make the required deposit for

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[3] References to "Rules" are to the Rules of Professional Conduct.

the cost of the transcript. Petitioner thereafter requested an extension of time to deposit the fees for the transcript and was granted an extension to October 15, 1993. On November 9, 1993, following deposit of the required fee by Petitioner, the transcripts were served on Petitioner.

On November 30, 1993, Petitioner filed a Motion for a Continuance and Motion to Settle Reporter's Transcript on Appeal, based on an error involving the transcripts. A supplement to the Motion was filed on December 12, 1993. On January 26, 1994, the Review Department granted Petitioner's motion and allowed Petitioner additional time to file her opening brief.

On March 26, 1994, Petitioner filed her opening brief. On May 2, 1994, the State Bar filed its response. On May 23, 1994, Petitioner filed a Motion to File a

Reply Brief, which motion was opposed by the State Bar, and on June 4, 1994, she filed a Motion for Postponement of Oral Argument for the Purpose [of filing] a Reply Brief. On June 16, 1994, the Review Department issued an order denying Petitioner's motions without prejudice to Petitioner making a request at the time of oral argument for leave to file a supplemental brief.

On June 29, 1994, oral argument was presented before the Review Department, at which time Petitioner was granted leave to file a Reply Brief. On July 28, 1994, Petitioner submitted her Reply Brief. On January 23, 1995, following additional briefing by both parties on various issues, the Review Department filed its Opinion on Review.

Petitioner thereafter filed a Motion for Reconsideration, which was opposed by

the State Bar. On March 6, 1995, the Review Department denied Petitioner's Motion. On March 3, 1995, Petitioner served a Motion to File Supplement to Motion for Reconsideration which was also opposed by the State Bar. On March 21, 1995, the Review Department denied Petitioner's Motion for lack of showing of good cause as to why the proposed additional arguments were not included in her motion for reconsideration.

On April 28, 1995, the State Bar Court's file and recommendation in this matter were transmitted to the California Supreme Court. On June 27, 1995, Petitioner filed a Petition for Review of Decision with the California Supreme Court. On July 13, 1995, the State Bar of California filed its Memorandum Response in Opposition to Petition for Review. On or about July 24, 1995, Petitioner filed a

document entitled "Petition for Disqualification and Removal of Justices and Appoint Disinterested Court of Appeals Justices to Hear and Motion to Declare State Bar Court Statutes, Rules, Regulations and Standards Unconstitutional."

On August 10, 1995, the Supreme Court issued its order denying Petitioner's Petition for Review and Petition for Disqualification. The Court further ordered that Petitioner be suspended from the practice of law for five years, execution of suspension stayed, on conditions that included actual suspension for two years and until restitution is completed and proof of rehabilitation, fitness to practice and learning and ability in the general law is established.

C. Statement of Facts

Petitioner was admitted to the

practice of law on June 27, 1975 and at all times herein mentioned was a member of the State Bar. Petitioner has no prior record of discipline.

Petitioner's misconduct in the present proceeding centered around her "overreaching at the expense of her sister-in-law, now deceased, a woman of limited income, in poor health, who lacked sophistication in business matters." (Appendix, p. E1.) The factual findings documenting Petitioner's misconduct are fully set forth in the Opinion on Review and are summarized below. (Appendix, pp. E1-E31.)

In or about 1982, Margie L. Brown[4], sister-in-law of Petitioner, retained Petitioner to represent her in a personal injury matter. Petitioner and Brown

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[4] Ms. Brown died in January 1992.

orally agreed that the matter would be handled on a contingency basis with Petitioner to recover 40 per cent on any settlement as attorney's fees. In September 1986, the parties agreed to settle Ms. Brown's case for $40,000. This amount was electronically transferred directly to a personal account maintained by Petitioner, although insurance company records noted that the account was a trust account. (Appendix, p. E3.)

Pursuant to the oral retainer agreement, Ms. Brown was entitled to receive $24,000 less $200 in estimated court costs. Petitioner admitted that none of the proceeds went to Ms. Brown.

Petitioner represented that Ms. Brown agreed to loan her, without security, $19,860, which Petitioner used as a down payment on the purchase of a residence. Of the remaining amount due Ms. Brown,

$140 represented cash Petitioner advanced Ms. Brown prior to the settlement, $3,250 represented an amount Ms. Brown agreed to pay for legal services provided by Petitioner in two prior legal matters, and $750 was allegedly given to Ms. Brown in cash at the time the insurance release was executed. (Appendix, p. E3.)

In support of her contention, Petitioner introduced into evidence a promissory note, dated September 26, 1986, that required Petitioner to pay Ms. Brown $19,860 with 10 per cent interest on or before January 31, 1991. Petitioner also produced an unsecured agreement, dated September 19, 1986 and signed by both herself and Ms. Brown, which provided that Ms. Brown agreed to loan Petitioner $20,000 so as to allow Petitioner to purchase real property. The agreement further provided that Ms. Brown agreed to

pay Petitioner legal fees in the amount of $2500 for a prior criminal case handled by Petitioner and $750 for a previous damage claim that had been filed against Ms. Brown. There was no mention of the alleged cash advancement in the agreement. (Appendix, p. E3-E4.)

The Review Department found that a loan was made from Ms. Brown to Petitioner. However, Petitioner's conduct with respect to the loan was found to have been in violation of former rule 5-101, Rules of Professional Conduct. The terms of the loan were clearly unfair in that Petitioner failed to provide any security for the loan and the loan did not provide for any payments to Ms. Brown until January 1991, which was deemed unreasonable in light of the financial situation of Ms. Brown. Petitioner also failed to describe such terms as the

assignment of a security interest or other lien against the real property that Petitioner acquired with the loan proceeds, which could have safeguarded Ms. Brown's interests[5]. In addition, Ms. Brown's written consent was not a knowing one because she was incapable of giving informed consent and her incapacity was known to Petitioner. (Appendix. pp. E16-E19.) As noted by the State Bar Court Hearing Judge:

> "At the time of the settlement, Brown was unmarried, having been widowed in 1975, poor, unsophisticated, 54 years of age, not well educated, and was helping to support several of her adult-age children, and several grandchildren, with her meager income as a part-time housekeeper and from Social Security. At the time the case settled, Brown was in poor

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[5] Petitioner failed to make the mortgage payments on the real property purchased with the funds loaned to her by Ms. Brown, resulting in the property being lost to foreclosure in 1989.

> health, but not as acutely ill as she later became, and was regularly drinking alcoholic beverages to excess. Brown's difficult circumstances and corresponding vulnerability were known to Respondent at the time the loan agreement was executed." (July 30, 1993, Decision of Hearing Department.)

Although the Hearing Judge concluded that Petitioner misappropriated the funds in question, the Review Department found that Petitioner did not misappropriate a majority of the settlement proceeds as the funds were obtained pursuant to the loan agreement. (Appendix, pp. E9-E13, E22-E25.) The Review Department did find that Petitioner misappropriated the cash payments alleged by Petitioner to have been advanced to Ms. Brown, finding that such payments had never been made. (Appendix, pp. E6-E8, E24-E25.) The Review Department further found that Petitioner had violated the provisions of

former rule 8-101 in that he commingled the settlement proceeds with personal funds by failing to place the funds in a trust account and failed to promptly pay over funds to Ms. Brown. (Appendix, pp. E25-E26.)

The Review Department concluded that Petitioner's misappropriation of funds, as well as her having "exploited her superior knowledge and position of trust to the detriment of a vulnerable client" constituted moral turpitude. (Appendix, p. E24.)

In determining the appropriate degree of discipline, the Review Department considered both mitigating and aggravating factors presented by the parties. (Appendix, pp. E26-E28.) The Review Department, while giving weight to Petitioner's lack of a prior record of discipline, expressed serious concern over

Petitioner's indifference towards rectifying the harm she caused and her lack of candor throughout the hearing:

> "There is other aggravating evidence in this case. Respondent's misconduct involved multiple acts of wrongdoing, and significantly harmed her client. She showed indifference towards rectifying or atoning for her misconduct and has failed to make any attempt to repay the loan, or to contact the heirs. The hearing judge's decision is replete with examples of respondent's lack of candor at the hearing. The carelessness with which respondent lost control of between four and five hundred case files when her practice closed raises grave doubts about her ability to protect the interests of other clients as well." (Appendix, p. E28.)

III

ARGUMENT

A. The California Supreme Court's Determination that Recusal Was Not Appropriate and its Subsequent Order Imposing Discipline Does Not Raise Due Process or Important Federal Questions.

Review on a writ of certiorari is not a matter of right and will be granted only where there are special and important reasons. Rule 10, Rules of the Supreme Court of the United States. None of the reasons set forth in rule 10 are present here. There is no decision by a federal appellate court (rule 10(a)); the California Supreme Court decision at issue does not conflict with that of another state court of last resort or of a federal appeals court (rule 10(b)); and the California Supreme Court decision at issue does not decide an important question of federal law that should be decided by this Court, nor is it in conflict with any decision of this Court (rule 10(c)).

Moreover, Petitioner's empty claims regarding the "partisan" nature of the Supreme Court are groundless and do not warrant recusal. Petitioner baldly

asserts that recusal of the California Supreme Court was required under the due process clause because of the alleged "partisan" role of the California Supreme Court in disciplinary matters. (Petition, pp. 12-13.)[6] However, Petitioner offers no legal authority in support of her contention. Rather than present evidence that would demonstrate a direct, personal, substantial pecuniary interest by the Court, Petitioner merely proffers highly speculative and conclusory allegations of bias. See Aetna Insurance Co. v. LaVoie, 475 U.S. 813, 822, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986).

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[6] The procedure for recusal of appellate justices was set forth in Kaufman v. Court of Appeal, 31 Cal. 3d 933, 184 Cal. Rptr. 302, 647 P.2d 1081 (1982), where the court found that state appellate justices follow the federal standard which allows each justice to decide for himself/herself whether the facts require recusal.

Petitioner further fails to establish that the California Supreme Court acted improperly in issuing its disciplinary order following Petitioner's recusal argument. To the contrary, it was entirely proper for the California Supreme Court to be given the opportunity to decide the issues of alleged bias of its individual members for itself. Flangas v. State Bar of Nevada, 655 F.2d 946, 950 (9th Cir. 1981).

B. Petitioner's Challenge to the Constitutionality of the California Regulatory System is Without Merit.

As best as can be understood from Petitioner's brief, it appears that Petitioner attempts to challenge the constitutionality of the structure of the California regulatory system based on allegations that the State Bar Court was impermissibly created. (Petition, pp. 18-

19.) Petitioner, who decided to raise this argument for the first time on appeal to the California Supreme Court, offers no pertinent authorities to support her contention.

Two decisions by the California Supreme Court, Lebbos v. State Bar, 53 Cal. 3d 37, 278 Cal. Rptr 689, 806 P.2d 317 (1991) and Conway v. State Bar, 47 Cal. 3d 1107, 255 Cal. Rptr. 390, 767 P.2d 617 (1989), expressly rejected the argument that the California disciplinary system represents an improper delegation of judicial authority that violates the Constitution. Both Lebbos and Conway were decided under the pre-1989 disciplinary system in which the State Bar Court was comprised of volunteers appointed by the State Bar Board of Governors. However, both decisions have even stronger force in establishing the legality of the present

disciplinary system in which full-time State Bar Court judges are appointed directly by this Court. (Bus. & Prof. Code § 6079.1.) The main point of the two decisions is that an attorney disciplinary system over which this Court maintains final authority and control is constitutional. As the Court held in Lebbos, "...the judicial power in disciplinary matters remains with the [Supreme] Court, and was not delegated to the State Bar." Lebbos, supra, 53 Cal. 3d at p. 48. This reasoning similarly applies to the present reconstituted State Bar Court, whose recommendations are subject to immediate and plenary review by the Supreme Court.

The United States Ninth Circuit Court of Appeals, in its recently published decision in Hirsch v. Justices of the Supreme Court of the State of California,

No. 94-55240, Slip. Op. at 11141 (9th Cir. Sept. 7, 1995)[7] rejected similar arguments advanced by other respondent attorneys who were involved in state disciplinary proceedings.

C. Petitioner's Broad Claims of Financial Interest and Bias by the California Supreme Court, the State Bar Court and Trial Examiner are Frivolous, Unsupported By Any Evidence and Entirely Without Merit.

Although confusing, Petitioner appears to contend that the California Supreme Court, the State Bar Court judges and the trial examiners have an improper financial interest in the outcome of disciplinary proceedings in violation of her due process rights. (Petition, pp. 13-17.)

Again, Petitioner's bald argument is without support in law or fact and is

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[7] Attached hereto as Appendix A.

entirely without merit. Petitioner presents no evidence of bias or any "direct, personal, substantial, [and] pecuniary interest" by either the Supreme Court, the State Bar Court or the State Bar trial examiners in the outcome of the case. See Aetna Life Insurance Company v. LaVoie, 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 823 (1986). Petitioner further fails to present any evidence that the aforementioned parties received improper payments to influence attorney disciplinary proceedings or that they are competitors who have a financial interest in seeing Petitioner disciplined. See Gibson v. Berryhill, 411 U.S. 564, 577-79, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973). Rather, Petitioner merely proffers speculative and conclusory allegations of a financial conflict and fails to establish that her "due process" rights

were violated.

Moreover, contrary to Petitioner's direct attack on the State Bar Court (Petition, pp. 13-15), there is no personal financial incentive for the State Bar Court judges to find an attorney culpable. The salaries of the State Bar Court judges are set by statute and are unaffected by the imposition or collection of costs. (Bus. & Prof. Code § 6079(d).) In addition, the sums collected from disciplinary costs are de minimis and have no effect on the State Bar's expenditures in carrying out its disciplinary functions. Petitioner presents no evidence that the salaries of the judges are dependent on the amount of costs collected or that the State Bar would be unable to pay the judges salaries without the money collected for costs.

The Ninth Circuit dismissed similar

frivolous claims in Hirsch v. Justices, supra, at 11150-52. The Court specifically rejected contentions that the California attorney disciplinary system was unconstitutionally tainted by bias because of alleged financial interest in the prosecution and outcome of disciplinary matters. The Court noted that, as here, plaintiffs in those proceedings had offered no evidence that the justices or judges received improper payments to influence attorney disciplinary proceedings or that they are competitors who might have a financial interest in seeing attorneys disbarred. The Court further held that "[a]lthough the State Bar pays the salaries of the Bar Court judges, the salaries are set by statute, see Cal. Bus. & Prof. Code § 6079(d), and no evidence suggests that they are in any way dependent on the

amount of fines collected or that the State Bar would be unable to pay the salaries of Bar Court judges without the money collected in disciplinary proceedings, which totals less that 1% of the State Bar Revenues (Footnote)." Id. at 11151.

Petitioner's reliance on In the Matter of Ross, 656 P.2d 832, 99 Nev. 1 (1983) and Ward v. Village of Monroeville, Ohio, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972) is unpersuasive. In Ross, the Nevada attorney disciplinary proceedings were deemed inconsistent with due process where the members of the State Bar Board of Governors served as both judicial officers and bar executives with responsibility to protect the financial integrity of the bar. In the instant matter, neither the State Bar's Office of Trials nor the State Bar Court judges have

any responsibility for the budget or financing of the Bar. That responsibility falls upon the Board of Governors, subject to the review and approval by the State Legislature. Cal. Bus. & Prof. Code, sections 6140, 6140.1. As such, no commingling of functions exists under the California disciplinary system.

In Ward, the Court found that a Mayor with executive responsibilities could not be regarded as an impartial judge where fines levied by him provided a substantial portion of the township's finances. Nothing like the Mayor's Court is present here as revenues from costs imposed are de minimis. See Hirsch v. Justices, supra, at 11151.

D. **Petitioner's Contention that Charged Sections of the State Bar Act and Rules of Professional Conduct Are Unconstitutional is Void of Merit.**

Having failed to establish at the State Bar Court level that the evidence was insufficient to support findings of culpability, Petitioner decided to argue on petition to the California Supreme Court that the charging rules and statutes are vague and fail to provide adequate notice of the prohibited conduct. (Petition, pp. 5, 7-10.) Petitioner repeats those contentions before this Court. (Petition, pp. 19-22.) Petitioner's contention is completely without merit.

To show that a statute or rule is unconstitutionally vague on its face, it must be proven that "the enactment is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'"

Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 495, fn. 7, 102 S.Ct. 1186, 1191, fn. 7, 71 L.Ed. 2d 362, (1982); see also Jordan v. DeGeorge, 341 U.S. 223, 71 S. Ct. 703, 707, 95 L. Ed. 886 (1951) (test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.) Moreover, "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Id. (citing Parker v. Levy (1974) 417 U.S. 733, 756, 94 S.Ct. 2547, 2567, 41 L.Ed.2d 439; In Re Kelly (1990) 52 Cal. 3d 487, 497, 276 Cal. Rptr. 375, 801 P.2d 1126 (1990)).

The statutes and rules require nothing more than is clearly required of all attorneys--that they conform their conduct according to the law and that

violation of the law will subject them to professional discipline. See In Re Kelly, supra, 52 Cal. 3d at 497. The record in this case demonstrates that Petitioner received notice of the charges filed and that several days of hearings were held, during which time evidence was presented concerning the charges. The rules and statutes clearly set forth the type of conduct that was prohibited, Petitioner contested those charges and presumably offered evidence in an attempt to refute those charges, but was unable to persuade the State Bar Court that the facts did not support the findings of culpability. See, e.g., Order Re-Opening Record, filed March 1, 1993 (Hearing Judge reopened record to allow parties to present additional evidence of various charges, including the rule 5-101 charge. Additional hearings were held on April 29, 1992 and on June

7,8,21, and 28, 1993.) It is disingenuous for Petitioner to now contend that there was insufficient notice of the prohibited conduct. See Brockway v. State Bar, 53 Cal. 3d 51, 63, 278 Cal. Rptr 836, 806 P.2d 308 (1991) (attorney never objected to introduction of evidence on lack-of-notice grounds).

Specifically, Petitioner challenges Rule 5-101, Rules of Professional Conduct of the State Bar, Business and Professions Code Section 6106 and Rule 8-101, Rules of Professional Conduct. The requirements under Rule 5-101 are clear and the agreement was unfair to Petitioner's client for the reasons set forth in the State Bar Court decision. (Appendix, pp. E16-E19.) The fact that Petitioner does not understand that such an agreement would constitute a rule 5-101 violation does not render the rule vague.

Petitioner's challenge to California Business and Professions Code section 6106 is likewise without basis. It is difficult to conceive of how an attorney who engaged in conduct whereby she "exploited her superior knowledge and position of trust to the detriment of her vulnerable client" and misappropriated client funds can contest the application of section 6106. See Jordan v. DeGeorge, supra, 341 U.S. 223, 71 S. Ct. 703, 705, 95 L. Ed. 886 (1951), (statute relating to deportation of illegal alien sentenced because of crime involving moral turpitude was not unconstitutional for vagueness in meaning of the phrase "crime involving moral turpitude"); Morrison v. State Board of Education, 1 Cal. 3d 214, 227-229, 82 Cal. Rptr. 175, 461 P.2d 375 (1969).

Finally, Petitioner's challenge to former rule 8-101(B)(4) is without merit.

(Petition for Review, p. 14.) Former rule 8-101(B)(4) requires an attorney to promptly pay or deliver to the client, upon demand, the property in the attorney's possession to which the client is entitled. As noted by the Review Department, the settlement funds had a "mixed character," with a portion of the funds belonging to Petitioner and a portion to Ms. Brown. The State Bar Court found that at least $700 of the funds received was promptly owed to Ms. Brown, that Ms. Brown made a demand for the funds, and that Petitioner's failure to "place the proceeds in a trust account and pay the remainder promptly to Ms. Brown violated the trust account rules." (Appendix A, p.19.) Petitioner was put on notice of this misconduct and such conduct violated the provisions of former rule 8-101(B)(4).

E. Petitioner Has Failed to Demonstrate that the Recommended Discipline was Erroneous.

The purpose of the disciplinary process is to protect the public, the courts and the legal profession from unfit practitioners, preserve public confidence in the profession and maintain the highest of professional standards for attorneys. Smith v. State Bar, 37 Cal. 3d 17, 26, 206 Cal. Rptr. 845, 687 P.2d 259 (1984); Standard 1.3, Standards for Attorney Sanctions for Professional Misconduct.) In light of these objectives, Petitioner has failed to establish that the recommended discipline is improper, erroneous or unlawful.

In disciplinary proceedings, each case is determined on its own set of facts and circumstances. Doyle v. State Bar, 15 Cal. 3d 973, 978, 126 Cal. Rptr. 801, 544 P.2d 937 (1976). Here, the record

demonstrates that Petitioner misappropriated client funds, commingled trust funds with personal funds and improperly solicited a loan from a vulnerable client following the client's receipt of a large settlement. Particularly egregious was Petitioner's overreaching at the expense of her sister-in-law, a vulnerable woman of limited income, in poor health, and who lacked sophistication in business matters. As the Review Department concluded:

> "Here, respondent's family ties to her client, her sister-in-law, made respondent all the more aware of the client's vulnerabilities and the considerable trust the client placed in respondent. Rather than honoring that trust, respondent exploited it for her own benefit and to the harm and detriment of the client." (Appendix, pp. E27-E28.)

Although only minimal factors in mitigation were present, Petitioner's

conduct was aggravated by several factors, including misconduct that involved multiple acts of wrongdoing and significantly harmed her client, lack of candor at the hearing and indifference towards rectifying or atoning for her misconduct. Perhaps most telling is the fact that Petitioner has failed to make any attempt to repay to funds, either to Ms. Brown prior to her death or to her heirs.

In light of the aforementioned conduct, which was found to have involved moral turpitude, the recommended discipline is not unjustified. See, e.g., Lawhorn v. State Bar, 43 Cal. 3d 1357, 240 Cal. Rptr. 848, 743 P.2d 908 (1987); Beery v. State Bar, 43 Cal. 3d 802, 239 Cal. Rptr. 121, 739 P.2d 1289 (1987); standard 2.3 (discipline for acts of moral turpitude includes actual suspension or

disbarment, depending on the extent of the harm to the victim, the magnitude of the act, and its relationship to the practice of law.)

IV

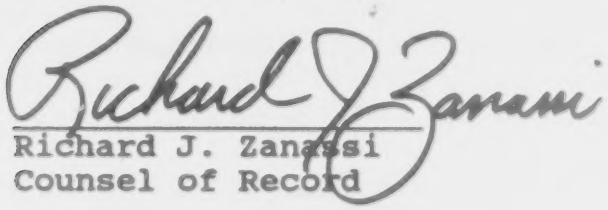
CONCLUSION

For each of the foregoing reasons, the State Bar respectfully submits that the petition should be denied.

DATED: October 3, 1995

Respectfully submitted,

Diane C. Yu
Lawrence C. Yee
Richard J. Zanassi



Richard J. Zanassi
Counsel of Record

Attorneys for Respondent
The State Bar of California

Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STUART H. HIRSH,
Plaintiff-Appellant,

v.

JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA: MALCOLM L. LUCAS; EDWARD PANELLI; JOYCE KENNARD; ARMAND ARABIAN; MARVIN BAXTER; RONALD M. GEORGE; and DAN LUNGREN, State Attorney General & acting personally for his private appointee's financial gain; STATE BAR OF CALIFORNIA; ELLEN R. PECK, Employee of the State Bar as a claimed Judge; DAVID C. CARR, Employee Prosecutor of State Bar Association,
Defendants-Appellees.

No. 94-55240
D.C. No.
CV-93-04114-SVW
ORDER AND
OPINION

RALPH F. SERVER,
Plaintiff-Appellant,

v.

SUPREME COURT OF THE STATE OF CALIFORNIA; STATE BAR OF CALIFORNIA,
Defendants-Appellees.

No. 94-55250
D.C. No.
CV-93-06789-SVW

HAROLD LENARD PERRY,
Plaintiff-Appellant,

v.

JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA: MALCOLM LUCAS, Chief; EDWARD PANELLI; STANLEY MOSK; JOYCE KENNARD; ARMAND ARABIAN; MARVIN BAXTER; RONALD GEORGE; and DAN LUNGREN; LISE PERLMAN, et al.,
Defendants-Appellees.

No. 94-55507
D.C. No.
CV-93-06909-SVW

Appeals from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

EDMUNDO B. ESPINOZA,
Plaintiff-Appellant,

v.

MALCOLM LUCAS; HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA; KATHRYN MICKLE; STANLEY MOSK; JOYCE KENNARD; ARMAND ARABIAN; MARVIN BAXTER; RONALD GEORGE; and DAN LUNGREN, State Attorney General,
Defendants-Appellees.

No. 94-56335
D.C. No.
CV-94-01299-MLH

Appeal from the United States District Court
for the Southern District of California
Marilyn L. Huff, District Judge, Presiding

Argued and Submitted
March 7, 1995—Pasadena, California
Memorandum Filed March 29, 1995

Order and Opinion Filed September 7, 1995

Before: James R. Browning and Robert R. Beezer, Circuit Judges, and Ancer L. Haggerty,* District Judge.

Per Curiam

SUMMARY

Attorneys and Judges/Professional Responsibility/ Civil Litigation and Procedure

The court of appeals affirmed a district court judgment. The court held that the district court did not err in dismissing on abstention grounds suits seeking an injunction to stop pending California attorney disciplinary proceedings and a declaratory judgment that the disciplinary system is unconstitutional.

Under California law, attorney disciplinary matters are handled by the State Bar Court, an administrative agency that is affiliated with the California State Bar Association (State Bar). The Bar Court's Hearing Department conducts formal adversarial hearings, and makes findings and recommendations regarding discipline. An attorney may appeal to the Bar Court's Review Department, which makes its own recommendation. The attorney may then file a petition for review with the California Supreme Court, which can either grant or deny review. The Supreme Court retains inherent jurisdiction over attorney disciplinary matters throughout the process.

*Honorable Ancer L. Haggerty, District Judge, United States District Court for the District of Oregon, sitting by designation.

Facing pending attorney disciplinary proceedings in California, appellants Stuart Hirsh, Ralph Server, Harold Perry and Edmundo Espinoza (collectively, Appellants) filed civil rights actions in the district court, alleging deprivation of various constitutional rights. The suits named as defendants appellees the Justices of the California Supreme Court, the State Attorney General, the State Bar, the Bar Court and the respective Bar Court judges and prosecutors involved. The Appellants sought an injunction to stop the pending disciplinary proceedings, a declaratory judgment that the disciplinary system is unconstitutional and monetary damages. The district court granted the government's motions to dismiss. The court dismissed each case on the ground that *Younger v. Harris* required abstention. The Appellants appealed.

[1] *Younger* and its progeny generally direct federal courts to abstain from granting injunctive or declaratory relief that will interfere with pending state judicial proceedings. [2] In this case, each of the Appellants faced ongoing disciplinary proceedings when he brought suit in federal court. [3] The ongoing proceedings were judicial in character. [4] The attorney disciplinary proceedings implicated important state interests. [5] Federal constitutional claims may be raised in judicial review of the Bar Court's decision; [6] the fact that review is discretionary does not bar presentation of federal claims by appellants.

[7] The Appellants failed to overcome a presumption of honesty and integrity. [8] They offered no evidence that the justices or judges received improper payments to influence attorney disciplinary proceedings or that they might have a financial interest in seeing them disbarred. [9] The fact that fines imposed in attorney disciplinary proceedings are paid to the State Bar treasury did not establish an impermissible financial interest. [10] The Appellants offered only conjecture to support their claim that Supreme Court justices are impermissibly biased because they appoint Bar Court judges. [11] The absence of a mandatory statutory recusal mechanism

applicable to California Supreme Court justices did not make a showing of bias unnecessary.

[12] The Appellants were incorrect in contending that abstention was inapplicable because the California disciplinary system allegedly involves an unconstitutional delegation of power, violates separation of powers and deprives them of a right to vote.

[13] All of the defendants were immune from liability for monetary damages. The Eleventh Amendment's grant of sovereign immunity bars monetary relief from state agencies, such as the California Bar Association and Bar Court. The immunity extended to the individual defendants acting in official capacities. [14] The individual defendants were also immune in their individual capacities.

COUNSEL

Stuart H. Hirsh and Ralph F. Server, Beverly Hills, California, Harold L. Perry, Oakland, California, and Edmundo Espinoza, San Diego, California, in pro per for the plaintiffs-appellants.

Robert M. Sweet, Marina Del Rey, California, for the defendants-appellees.

ORDER

The memorandum disposition filed March 29, 1995, is redesignated as a per curiam opinion.

OPINION

PER CURIAM:

Facing pending attorney disciplinary proceedings in California, each appellant filed suit in federal court under 42 U.S.C. § 1983, alleging deprivation of various constitutional rights. The district court granted the government's motions to dismiss. We affirm.

I. *Background*

A. The California Attorney Disciplinary System

Under California law, attorney disciplinary matters are handled by the State Bar Court ("Bar Court"), an administrative agency affiliated with the California State Bar Association ("State Bar"). Calif. Bus. & Prof. Code § 6086.5. The Bar Court is divided into a Hearing Department and a Review Department. *Id.* §§ 6079.1, 6086.65. Disciplinary proceedings are commenced by serving the accused attorney with a Notice to Show Cause. The Hearing Department then conducts a formal adversarial hearing during which the accused attorney and a State Bar prosecutor present evidence before a Bar Court judge. The Hearing Department makes findings and a recommendation regarding appropriate discipline. The attorney may appeal to the Review Department, which reviews the Hearing Department's findings de novo and makes its own recommendation. The attorney may then file a petition for review with the California Supreme Court.[1] *Id.* § 6082. The Supreme Court either grants review and issues a final order or denies review, in which case the Bar Court's recommendation is filed as an order of the Supreme Court. *Id.* § 6084; Calif.

[1]If no petition for review is filed, the Bar Court's recommendation becomes a final order of the California Supreme Court, although the Supreme Court may review the recommendation on its own motion. *Id.* § 6084; Calif. Court Rule 953(b).

Court Rule 954. Throughout this process, the Supreme Court retains inherent jurisdiction over attorney disciplinary matters. *Id.* 951(g).

B. The Federal Suits

Each of the suits named as defendants the Justices of the California Supreme Court, the State Attorney General, the State Bar, the Bar Court, and the respective Bar Court judges and prosecutors involved. The appellants sought an injunction to stop the pending disciplinary proceedings, a declaratory judgment that the disciplinary system is unconstitutional, and monetary damages based on alleged deprivations of state and federal constitutional rights. The complaints allege that the disciplinary system deprives appellants of various constitutional rights, including due process, equal protection, the right to vote, and the right to court access. The district court dismissed each case on the ground that *Younger v. Harris*, 401 U.S. 37 (1971), required abstention.

II. *Abstention from Granting Injunctive and Declaratory Relief*

A. Requirements for Abstention

[1] *Younger* and its progeny generally direct federal courts to abstain from granting injunctive or declaratory relief that would interfere with pending state judicial proceedings. *Id.* at 40-41; *Samuels v. Mackell*, 401 U.S. 66, 73 (1971) (extending *Younger* to declaratory judgments). Absent "extraordinary circumstances", abstention in favor of state judicial proceedings is required if the state proceedings (1) are ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). Each prerequisite is satisfied in each of these cases.

1. *Ongoing State Proceedings*

[2] Each appellant faced ongoing disciplinary proceedings when he brought suit in federal court. *See Beltran v. State of California*, 871 F.2d 777, 782 (9th Cir. 1988) (stating that abstention requires proceedings to be ongoing at the time plaintiff initiates federal proceedings). Notices to Show Cause had been directed to Hirsh and Espinoza, and the California Supreme Court had not yet filed an order regarding the Bar Court's recommendations with respect to Perry and Server. *See Flangas v. State Bar of Nevada*, 655 F.2d 946, 949 (9th Cir. 1981) (holding proceedings were ongoing where state Board of Bar Governors had recommended discipline but final binding action had yet to be taken by the Nevada Supreme Court).

[3] The ongoing proceedings were judicial in character. Under California's discipline system, the Hearing Department conducts a formal hearing and makes findings, the Review Department conducts a de novo review of those findings, and the Supreme Court retains inherent jurisdiction over the proceedings, including power to review the Bar Court's findings. Appellants point to no relevant distinction between this procedure and that held to be judicial in nature in *Middlesex*. 457 U.S. at 433-34; *see also Partington v. Gedan*, 880 F.2d 116, 122 (9th Cir. 1989) (attorney disciplinary proceedings conducted by an ethics committee or its equivalent under the auspices of the state supreme court are judicial for purposes of *Younger*).

2. *Important State Interests*

[4] California's attorney disciplinary proceedings implicate important state interests. *See Middlesex*, 457 U.S. at 434 ("The State . . . has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses.").

3. *Opportunity to Present Federal Claims*

[5] The California Constitution precludes the Bar Court from considering federal constitutional claims. *See* Calif. Const. art. III, § 3.5. However, such claims may be raised in judicial review of the Bar Court's decision. This opportunity satisfies the third requirement of *Younger*. *See Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 629 (1986); *Kenneally v. Lungren*, 967 F.2d 329, 332 (9th Cir. 1992).

[6] Appellants contend their opportunity for judicial review is inadequate because it is wholly discretionary.[2] Judicial review is inadequate only when state procedural law *bars* presentation of the federal claims. *See Partington*, 880 F.2d at 123; *accord Moore v. Sims*, 442 U.S. 415, 430 & n.12 (1979) (finding abstention appropriate because state law did not impose procedural barriers to raising constitutional claims). The fact that review is discretionary does not bar presentation of appellants' federal claims — appellants can raise the claims in a petition for review. *See Beltran*, 871 F.2d at 781, 783 (opportunity to present federal claims in a petition for writ of review is sufficient to trigger *Younger* abstention, even though the court of appeal simply "denied the petition without elaboration"); *Martori Bros. Distribs. v. James-Massengale*, 781 F.2d 1349, 1352, 1354 (9th Cir.), *amended on other grounds*, 791 F.2d 799 (9th Cir. 1986) (opportunity to raise federal claims in petition for review satisfied the

[2]Hirsh also argues that the California Supreme Court's summary denial of his interim motion precluded judicial review of his federal claims. This contention is meritless — Hirsh can raise those claims in his petition for review following the conclusion of disciplinary proceedings in the Bar Court and has stated his intention to do so. *See Mason v. Departmental Disciplinary Comm.*, 894 F.2d 512, 515 (2nd Cir. 1990) (a state court's "refusal to halt the [attorney disciplinary] inquiry at its incipient stage provides no basis for believing that [the court] will be reluctant to entertain any legitimate objections [the attorney] may have in the event that disciplinary sanctions are improperly imposed").

requirements of *Younger* even though a reviewing court could deny the petition summarily); *Fresh Int'l Corp. v. ALRB*, 805 F.2d 1353, 1362 (9th Cir. 1986) (finding abstention applicable because plaintiff "could have presented [its federal claim] to the court of appeal in its petition for review").

The California Supreme Court's rules state that Bar Court decisions will be reviewed "when it appears . . . necessary to settle important questions of law." Calif. Court Rule 954(a). The court has considered federal constitutional challenges to the attorney disciplinary procedure. *See, e.g., Lebbos v. State Bar*, 53 Cal. 3d 37, 48 (1991). Refusing to abstain would require presuming that the California Supreme Court will not adequately safeguard federal constitutional rights, a presumption the U.S. Supreme Court squarely rejected in *Middlesex*. 457 U.S. at 431. Accordingly, the third requirement for *Younger* abstention test was satisfied.

B. Applicability of Exceptions to Abstention

1. *Bias*

[7] Although a federal court is normally required to abstain if the three prongs of the *Younger* test are satisfied, abstention is inappropriate in the "extraordinary circumstance" that the state tribunal is incompetent by reason of bias. *See Gibson v. Berryhill*, 411 U.S. 564, 577-79 (1973). However, "one who alleges bias 'must overcome a presumption of honesty and integrity in those serving as adjudicators.' " *Kenneally*, 967 F.2d at 333 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Appellants failed to overcome this presumption.

[8] Appellants contend California Supreme Court justices and Bar Court judges have a direct and substantial financial interest in the outcome of disciplinary hearings. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824-25 (1986). However, appellants offer no evidence that the justices or judges receive improper payments to influence attorney disciplinary

proceedings or that they are competitors who might have a financial interest in seeing appellants disbarred. *See Gibson*, 411 U.S. at 577-79 (optometrists who sat on licensing board were biased because of their financial interest in the outcome of hearings to revoke the licenses of optometrists with whom they competed).

[9] The fact that fines imposed in attorney disciplinary proceedings are paid to the treasury of the State Bar does not establish an impermissible financial interest. Although the State Bar pays the salaries of the Bar Court judges, the salaries are set by statute, *see* Cal. Bus. & Prof. Code § 6079(d), and no evidence suggests that they are in any way dependent on the amount of fines collected or that the State Bar would be unable to pay the salaries of Bar Court judges without the money collected in disciplinary proceedings, which totals less than 1% of the State Bar's revenues.[3]

[10] Appellants offer only conjecture in support of their claim that Supreme Court justices are impermissibly biased because they appoint Bar Court judges. As the district court noted, district court judges are not deemed incompetent to review the findings of magistrate judges whom they participate in appointing. *Compare Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 779-80 & n.10 (9th Cir. 1982) (school board reviewing *its own* prior decision was not impermissibly biased).

[11] The absence of a mandatory statutory recusal mechanism applicable to justices of the California Supreme Court

[3]This fact distinguishes the present case from *In the Matter of Ross*, 656 P.2d 832 (Nev. 1983), in which the Nevada attorney disciplinary system was deemed to violate due process in part because disciplinary fines were a crucial source of revenues for the State Bar. *Id.* at 836. Moreover, the adjudicators under the Nevada system were the State Bar Board of Governors, who were also responsible for the financial integrity of the bar. *Id.* No such commingling of functions exists under the California disciplinary system.

does not make a showing of bias unnecessary. The case upon which the appellants rely, *Flangas v. State Bar of Nevada*, 655 F.2d 946 (9th Cir. 1981), held only that the court would not consider the bias exception to *Younger* because the plaintiff had not exhausted his state court remedies by invoking the available statutory recusal procedure. *See id.* at 950. *Flangas* did not imply that the absence of a particular recusal mechanism made it unnecessary to consider whether bias existed in fact.

Finally, appellants suggest the disciplinary process is tainted by bias because the State Bar has both investigative and adjudicative functions. However, the Supreme Court has rejected the contention that such a combination necessarily creates an unacceptable risk of bias. Such decisionmakers are still entitled to a presumption of honesty and integrity when serving as adjudicators. *See Withrow*, 421 U.S. at 47. Appellants offer no evidence to rebut this presumption.

2. *Patent Unconstitutionality*

[12] We reject appellants' contention that abstention is inapplicable because the California disciplinary system allegedly involves an unconstitutional delegation of power, violates separation of powers, and deprives appellants of a right to vote.[4] The California Supreme Court has previously rejected similar constitutional challenges on the ground the Bar Court functions as an administrative arm of the Court, which maintains final authority over discipline. *See Lebbos v. State Bar*, 53 Cal. 3d 37, 48 (1991). In any case, regardless of the ultimate merits of these claims, the pertinent statutes are not " 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort

[4]It is unclear whether any of these claims state a violation of a federal, as opposed to a state, constitutional guarantee. We need not reach that issue.

might be made to apply it.' " *Younger*, 401 U.S. at 53-54 (quoting *Watson v. Buck*, 313 U.S. 387, 402 (1941)). Accordingly, any violation would not justify refusal to abstain.

III. *Dismissal of Claims for Monetary Relief*

[13] All of the defendants are immune from liability for monetary damages.[6] The Eleventh Amendment's grant of sovereign immunity bars monetary relief from state agencies such as California's Bar Association and Bar Court. *See Lupert v. California State Bar*, 761 F.2d 1325, 1327 (9th Cir. 1985). This immunity extends to the individual defendants acting in their official capacities. *See Pena v. Gardner*, 976 F.2d 469, 472 (9th Cir. 1992); *see also Hafer v. Melo*, 112 S. Ct. 358, 361-62 (1991) (holding that a defendant official acting in his official capacity receives the same immunity as the government agency to which he belongs).

[14] The individual defendants are also immune in their individual capacities. The justices of the California Supreme Court have absolute immunity for their role in reviewing the recommendations of the Bar Court. *See Rosenthal v. Justices of the Supreme Court of California*, 910 F.2d 561, 565-66 (9th Cir. 1990). They are also entitled to absolute legislative immunity for actions relating to the promulgation of disciplinary rules. *See Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 734 (1980).

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[6]The district court relied on *Younger* abstention as its basis for dismissing the monetary claims. However, the applicability of *Younger* abstention to appellants' monetary claims is unclear. *Compare Mann v. Jett*, 781 F.2d 1448, 1449 (9th Cir. 1986) (abstaining in a § 1983 action because "such an action would have had a substantially disruptive effect upon ongoing state [ ] proceedings") *with Lebbos v. Judges of the Superior Court*, 883 F.2d 810, 816-17 (9th Cir. 1989) (suggesting that abstention is inappropriate where ongoing state proceeding afforded no opportunity for the plaintiffs to receive monetary relief); *see also Deakins v. Monaghan*, 484 U.S. 193, 202 (1988) ("[T]he District Court has no discretion to dismiss rather than to stay claims for monetary relief that cannot be redressed in the state proceeding."). We decline to address the issue here.

The Bar Court judges and prosecutors have quasi-judicial immunity from monetary damages. Administrative law judges and agency prosecuting attorneys are entitled to quasi-judicial immunity so long as they perform functions similar to judges and prosecutors in a setting like that of a court. *Butz v. Economou*, 438 U.S. 478, 511-17 (1978). The factors cited by the *Butz* Court apply equally to the personnel of the Bar Court — hearings are adversarial, errors are correctable on appeal, the judges make factual findings and perform other adjudicatory functions, and Bar Court decisions are controversial enough to stimulate harassing damage actions against the adjudicators, as this case illustrates. *See id.* Thus, the Bar Court judges and prosecutors are immune from damages. *See Clark v. State of Washington* 366 F.2d 678, 681 (9th Cir. 1966) (holding that Bar Association prosecuting attorney was entitled to immunity).

Finally, the California Attorney General is entitled to absolute prosecutorial immunity for his limited role in the disciplinary system. *See Imbler v. Pachtman*, 424 U.S. 409, 427 (1976).

IV. *Espinoza's Recusal Motion*

Judge Huff did not abuse her discretion by denying the motion for recusal. She is not a member of the State Bar and noted that the California Constitution forbids such membership. Cal. Const. art. VI, § 9. Although Judge Huff occasionally participated in State Bar activities, she was not paid, except for reimbursement of expenses. We reject Espinoza's contention that, "a reasonable person with knowledge of all the facts would conclude that [Judge Huff's] impartiality might reasonably be questioned." *Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th Cir. 1993).

AFFIRMED.